UNITED STATES COURT OF MILITARY COMMISSION REVIEW
***before* F. Williams, D. Conn, and C. Thompson**

	BRIEF ON BEHALF OF APPELLANT
	CMCR CASE NO. 09-001
UNITED STATES	Tried at Guantanamo, Cuba on 7 May 2008, 15 August 2008, 24 September 2008, 27 October – 3 November 2008
Appellee	
v.	Before a Military Commission convened by Hon. Susan Crawford
ALI HAMZA AHMAD SULIMAN AL BAHLUL	Presiding Military Judge Colonel Peter Brownback, USA (Ret.) Colonel Ronald Gregory, USAF
Appellant.	
	DATE: 1 September 2009

TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via e-mail to CAPT Edward White on the 1st day of September 2009.

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ISSUES PRESENTED

(1) Did Mr. al Bahlul's prosecution for making a political video violate the First Amendment?

(2) Were the offenses charged triable by military commission under the Define and Punish Clause?

(3) Did the charge of Material Support for Terrorism violate the Ex Post Facto Clause?

(4) Is the Military Commissions Act an unconstitutional bill of attainder?

(5) Did the Military Commissions Act violate the equal protection component of the Due Process Clause?

STATEMENT OF STATUTORY JURISDICTION

This court has jurisdiction to review all final judgments rendered by military commission as approved by the Convening Authority. 10 U.S.C. §§ 950c, 950f. The instant grounds of appeal raise only questions of law for which this court entertains *de novo* review, 10 U.S.C. § 950f(d), and relate to personal jurisdiction, the legal sufficiency of the charges and whether the military judge's instructions to the members constituted plain error. *See* R.M.C. 905(e); *United States v. Westmoreland*, 31 M.J. 160, 163-65 (C.M.A. 1990).

STATEMENT OF THE CASE

On or about 23 February 2004, the Deputy Appointing Authority preferred a single Conspiracy charge against Ali Hamza Ahmed Suliman al Bahlul. This charge was supported by 11 overt acts spanning from 1999-2001, which alleged membership in and support of al Qaeda. (Ex. A). The Appointing Authority referred this charge to a military commission on or about 28 June 2004. (Ex. B). On or about 8 November 2004, Judge James Robertson issued a stay in the military commission of Salim Hamdan. *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152 (D.D.C. 2004). This triggered a *de facto* halt to Mr. al Bahlul's case as well. On or about 31 August 2005, the Secretary of Defense issued Military Commission Order No. 1, which substantially overhauled the military commission system. (Ex. C). On or about 4 November 2005, the Appointing Authority referred the Conspiracy charge to a new military commission and vacated all prior proceedings. (Ex. D). These proceedings were halted in June 2006 after the Supreme Court decided *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

In October 2006, the Military Commissions Act of 2006, Pub. L. 109-366 (2006) ("MCA") was signed into law. On or about 8 February 2008, three charges were preferred against Mr. al Bahlul. (R. at AE 1). The first charge, Conspiracy, was substantively identical to the previously referred Conspiracy charge. The second charge, Solicitation, alleged that Mr. al Bahlul had made propaganda for the purpose of recruiting al Qaeda members, specifically a video entitled *State of the Ummah*. The third charge, Material Support for Terrorism, incorporated the overt acts alleged in the Conspiracy charge in support of the allegation that Mr. al Bahlul provided material support to a terrorist organization. On or about 26 February 2008, the Convening Authority referred these charges for trial by military commission. (R. at AE 2).

Mr. al Bahlul was arraigned on or about 7 May 2008. (R. at 45). He asserted his desire to represent himself and this request was granted by COL Peter Brownback, USA, who had served as the Presiding Officer for both of Mr. al Bahlul's previous military commissions. On or about 21 May 2008, COL Brownback was replaced by Col Ronald Gregory, USAF, as military judge. (R. at AE 24).

Col Gregory held his first hearing as military judge on 15 August 2008, where he revisited the issue of self-representation on motion of the government. (R. at 53, 78-79). The military judge stated his intention to engage Mr. al Bahlul in a *Faretta* inquiry, but Mr. al Bahlul refused to proceed after the government could not locate a document he had prepared for that purpose. (R. at 67). Mr. al Bahlul then absented himself from the hearing and the military judge revoked his *pro se* status. (R. at 75-82). On or about 24 September 2008, Mr. al Bahlul entered a plea of not guilty, stated his intention to boycott his trial and made objections to the military commission and charges. (R. at 96, 167, 175-180). The military judge construed this as preserving post-trial challenges to the charges and the system as a whole (R. at 98-99).

Mr. al Bahlul's trial commenced on or about 27 October 2008. The government called fourteen witnesses. The defense remained silent throughout. On or about 3 November 2008, Mr. al Bahlul was found guilty on all charges and specifications, excepting one overt act alleged in Charges I and III. (R. at 916-917). The sentencing hearing commenced that same day. The government called two witnesses. Mr. al Bahlul made an unsworn statement to the members that variously reaffirmed his commitment to al Qaeda. After an hour of deliberation, the members sentenced Mr. al Bahlul to life imprisonment. (R. at 992). On or about 3 June 2009, the Convening Authority approved the findings and sentence without exception. (Ex. E). This instant appeal followed.

STATEMENT OF FACTS

Pakistani forces captured Mr. al Bahlul and turned him over to U.S. custody in December 2001. (R. at 190). He was transferred to Guantanamo Bay ("GTMO") in January 2002.

Mr. al Bahlul admitted most of the factual allegations against him at a hearing on 24 September 2008. He nevertheless pleaded not guilty, stating "I'm not guilty, and what I did was not a crime." (R. at 175). He admits to traveling to Afghanistan in the early 1990s to fight against the communists and returning to Afghanistan in 1999 to join al Qaeda. (R. at 177-178). He admits to swearing *bayat* (allegiance) to Usama bin Laden (UBL), working as technical support and ultimately serving as UBL's personal secretary. (R. at 179). In his role as UBL's personal secretary, he admits to drafting speeches as well as pledges of *bayat* and martyr wills for al Qaeda recruits. (R. at 193-194).

According to the government, Mr. al Bahlul's most significant contribution to al Qaeda was his production of a video called *State of the Ummah*. (R. at 316-322). *State of the Ummah* is referred to in the record by various names, including *The Destruction of the American Destroyer the U.S.S. COLE* and the *COLE Video*. *State of the Ummah* is the original name by which it is popularly known. By agreement of counsel for the parties, pleadings in this case will refer to it as *State of the Ummah* for consistency.

Mr. al Bahlul's production of *State of the Ummah* is listed as an overt act in support of Charges I and III. According to the government's opening, it is also the foundation of the central charge in the case –Solicitation. (R. at 321). The government called three federal prisoners to testify about seeing the video at al Qaeda training camps. Five law enforcement officers testified on the video's production and the chain of custody linking it to Mr. al Bahlul. Three interrogators testified about Mr. al Bahlul's taking credit for its production. The government

even called a "propaganda expert [to] breakdown this video and place it in the context of other propaganda products produced by al Qaeda and their purposes." (R. at 318). The government's entire sentencing case consisted of two victims of the attack on the U.S.S. COLE, who testified about their reactions to seeing *State of the Ummah* on the Internet.

State of the Ummah itself is an hour-and-forty-five minute documentary that Mr. al Bahlul claims to have made in early 2001. (R. at PE 31F-G). It opens and closes with footage of the U.S.S. COLE overlain by a simulated explosion. It is composed largely of news footage intercut with broadcast speeches by UBL and others on such issues as the Israeli-Palestinian conflict, the Saudi government, and the moral necessity of holy war against the West.

It is organized into three parts –"The Problem," "The Causes," and "The Solution." The Problem contains news footage from and commentary on various conflicts in which Muslims are ostensibly being victimized. The Causes contains footage and commentary that is primarily a critique of the Saudi royal family. The Saudis are portrayed as selling out to the West and Muslims more broadly are accused of "loving the world and hating death," a scriptural reference meaning that they have turned away from God for the allure of material possessions. *See, e.g.*, Qur'an 2:93-96; John 1:15.

The final forty-five minutes of the video is titled "The Solution." This section begins with a plea for "migration," specifically Muslim migration to Islamic lands. The video then proceeds for thirty minutes on "preparation," which is composed largely of training camp footage, intercut with speeches by UBL encouraging Muslim men to undergo spiritual and military training. Lastly, the video extols the virtues of "holy war" and praises those who perpetrated suicide attacks against Saudi Arabia, Israel and the U.S.S. COLE.

SUMMARY OF ARGUMENT

Mr. al Bahlul conceded most of the factual allegations against him. The objections he asserted prior to trial were to the legitimacy of the charges and the system as a whole. They are addressed in this appeal as three constitutional challenges to the charges and two constitutional challenges to how personal jurisdiction is defined by the MCA. Detailed summaries of argument are provided at the beginning of each assignment of error.

The first assignment of error is a challenge primarily to Charge II, but also to overt acts in support of Charges I and III. It is appropriate to begin with this Charge, because Mr. al Bahlul's creation of *State of the Ummah* was the centerpiece of the government's case. The government conceded that *State of the Ummah* was a "political argument." The government never presented any evidence, however, that *State of the Ummah* went beyond the limits of First Amendment protection. Instead, Mr. al Bahlul's trial very much became a prosecution of his political ideas. While these are ideas that most Americans find offensive and which invite condemnation, they are nevertheless ideas that may not be censored or prosecuted by the courts. His conviction on Charge II must therefore be reversed and his case remanded for resentencing.

The second is a challenge to all three charges because none of them are war crimes. Military commissions are Article I courts whose subject matter jurisdiction is limited to war crimes only. Material Support for Terrorism, Conspiracy and Solicitation are not war crimes and the military commission lacked any jurisdiction over them. His conviction on these charges must therefore be reversed.

The third is a challenge to Charge III on *ex post facto* grounds. Charge III alleges that Mr. al Bahlul provided material support to a terrorist organization from 1999-2001 in

Afghanistan and Pakistan. Material support for a terrorist organization, however, was not an extraterritorial crime until 2004. Because he could not be charged with this offense at the time of his capture in 2001, he could not be charged with it in 2008. His conviction on this charge must therefore be reversed and his case remanded for resentencing on any remaining charges.

The fourth and fifth are challenges to how personal jurisdiction is defined by the MCA. The MCA limits personal jurisdiction to "alien unlawful enemy combatants" ("AUEC"). This limitation suffers from two related, but distinct, constitutional infirmities rooted in Congress' effort to single out a known group of individuals for special prosecution and rights deprivation. First, Congress reverse-engineered the AUEC definition to single out GTMO detainees by virtue of their irreversible past conduct. This makes the MCA an unconstitutional bill of attainder. Second, AUEC status hinges on the suspect classification of alienage in violation of the equal protection component of the Due Process Clause. The legislative history of the MCA reveals demonstrable animus toward aliens, as such, and a Congressional motive to discriminate against aliens, precisely because it would avoid the political accountability that would result if military commissions had jurisdiction over citizens. In both respects, the MCA is unprecedented and violates some of the most basic non-discrimination principles in the Constitution. On either ground, therefore, the military commission lacked personal jurisdiction over Mr. al Bahlul and his conviction must be reversed.

ERRORS AND ARGUMENT

I. MR. AL BAHLUL WAS CONVICTED ON THE BASIS OF POLITICAL SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

The government's case on Charge II specifically, and against Mr. al Bahlul more broadly, revolved around one central allegation: *State of the Ummah* "is propaganda, a political argument and indoctrination of solicitation." (R. at 316-17). "One of the central goals of the al Qaeda organization was to bring forth an Islamic government that met the desires of the leadership of al Qaeda, of Usama bin Laden and Ayman Zawahiri." Mr. al Bahlul was convicted because he helped "to spread this message." *Id*.

The First Amendment, however, bars the prosecution of political argument except in a few narrow circumstances, such as incitement. Here, no reasonable trier of fact could find that *State of the Ummah* rises to the level of incitement under *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The record instead shows that *State of the Ummah* is exactly what the government contended it was –a political argument that provoked the very kind of debate and dissent that warrants its protection *per se* under the First Amendment. Additionally, it was incumbent upon the military judge to instruct the members on what speech is and is not criminal. This he did not do and the government exploited this fact to put Mr. al Bahlul's political beliefs on trial.

To be clear, Mr. al Bahlul is not claiming First Amendment rights on the battlefield. He is not claiming any affirmative right that he could assert to enjoin the government's ability to wage war by, for example, targeting enemy radio stations.

Prosecution, however, is different. Mr. al Bahlul was brought into the jurisdiction of the United States and criminally tried in a court system established by congressional act. All of the witnesses who testified about his video were Americans and the government repeatedly

emphasized how his video was directed toward American audiences. The government cannot use the courts to suppress ideas, most especially ideas shared with and relevant to Americans.

There is little doubt that Mr. al Bahlul is not a sympathetic defendant. He embraces an ideology that glorifies violence, justifies terrorism and opposes constitutional democracy. Charge II, however, unconstitutionally conflates offensive behavior with criminal behavior. As offensive as it may be, *State of the Ummah* is speech that falls within the core protections of the First Amendment, which forbids the prosecution of "the thoughts, the beliefs, the ideals of the accused . . . ." (R. at 892).

a. The First Amendment governs any judicial proceeding that seeks to impose civil or criminal liability for speech.

i) Even if aliens cannot file lawsuits to enjoin government action abroad, the First Amendment governs the adjudication of liability by U.S. courts.

The First Amendment governs what legal liability U.S. courts can impose for speech. *See New York Times v. Sullivan*, 377 U.S. 254, 265 (1964). Mr. al Bahlul was prosecuted in a U.S. court. That court was convened on U.S. territory pursuant to a congressional law.

While the Supreme Court has never decided a case that involved the imposition of liability for foreign speech, the lower state and federal courts have treated the application of the First Amendment in such cases as a virtual given.[1] This has been true even when a defendant's only contacts with the United States were the solicitation of others to commit crimes here. In

[1] *See, e.g.*, *Am. Land Program v. Bonaventura Uitgevers Maatschappij*, 710 F.3d 1449 (10th Cir. 1983) (stating that the First Amendment would apply to the substantive libel claims against Dutch journalists); *Sarl Louise Ferand v. Viewfinder*, 406 F.Supp.2d 274 (S.D.N.Y. 2005) (recognition of foreign judgment bound by fair use), *remanded for further findings of fact*, 489 F.3d 474 (2nd Cir. 2007); *Yahoo v. La Ligue Contre Le Racisme et l'Antisemitisme*, 169 F.Supp.2d 1181 (N.D.Cal. 2001) (refusal to recognize a foreign injunction against Nazi Internet postings), *rev'd on other grounds*, 433 F.3d 1199 (9th Cir. 2006); *Mattel v. MCA Records, et al.*, 28 F.Supp. 2d 1120 (C.D. Cal 1998) (fair use applied to Swedish rock song about "Barbie"); *Bryks v. Canadian Broadcasting Company*, 928 F.Supp 381 (S.D.N.Y. 1996) (First Amendment libel standard applied in an action by a U.S. citizen against a Canadian news organization); *DeRoburt v. Gannett*, 83 F.R.D. 574 (D.H.I. 1979) (holding that the First Amendment applies to any libel action brought in U.S. courts); *Telnikoff v. Matusevich*, 347 Md. 561 (Md. 1997) (refusal to recognize a foreign libel judgment that was inconsistent with the First Amendment); *Bachanan v. India Abroad*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992) (refusal to recognize a foreign libel judgment that was inconsistent with the First Amendment).

United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1991), *abrogated on other grounds by* Pub. L. 99-603, Title I, Part B, § 112 (1986), the defendants were convicted for running an "underground railroad" that illegally smuggled Central American refugees into the United States via Mexico. One of the defendants, Ramon Dagoberto Quinones, operated exclusively on the Mexican side of the border. He was convicted for instructing illegal immigrants on how to find an unguarded hole in the border fence and refuge once through. He argued on appeal that this was protected speech. *Id*. at 684.

Though Quinones did not prevail on the merits, the Court of Appeals never doubted the applicability of the First Amendment. It applied the First Amendment test that the Supreme Court laid out in *Brandenburg* and held that Quinones' speech was "intended and likely to produce or incite an imminent lawless act." *Aguilar*, 883 F.2d at 684. Neither Quinones' citizenship nor the fact that the alleged conduct took place abroad was even relevant.[2]

To be clear, the issue is not whether Mr. al Bahlul enjoyed First Amendment rights on the battlefield. Though the Supreme Court has never specified what entitlement aliens have to First Amendment rights abroad, it has identified legitimate reasons to be cautious about granting them rights of action to enjoin U.S. foreign policy. In *Kleindienst v. Mandel*, 408 U. S. 753 (1972), for example, a self-described "revolutionary Marxist" sued for entry into the United States on First Amendment grounds. The Court ultimately denied his claim, not on speech grounds, but because he had "no constitutional right of entry to this country as a nonimmigrant or otherwise." *Id*. at 762; *see also United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904). Likewise, in *Johnson v. Eistentrager*, 339 U.S. 763 (1950), the First Amendment was not before the court, but *dicta* from the majority opinion doubted whether aliens in a theatre of war could sue to enjoin the

[2] In fact, Quinones unsuccessfully asserted that he had so few contacts with the United States, in terms of citizenship and property, that the court had no personal jurisdiction over him. *Aguilar*, 883 F.2d at 692.

military's infringement of their freedom of speech, right to bear arms, or other constitutional rights. The Court reasoned that it would be bizarre to let aliens file lawsuits in U.S. courts to assure constitutional rights against "the military's efforts to contain 'enemy elements, guerilla fighters, and 'were-wolves.'" *Boumediene v. Bush*, 128 S.Ct. 2229, 2261 (2008) (*quoting Eisentrager*, 339 U.S. at 784).

Mr. al Bahlul did not, however, file a lawsuit in a U.S. court. He was haled into one for criminal prosecution. The question is not what rights Mr. al Bahlul had in Afghanistan, but the extent to which U.S. courts can punish political speech. *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (distinguishing between constitutional violations that occur abroad, and constitutional violations that occur "at trial."). Unlike exclusion in *Kleindienst* or the waging of war in *Eisentrager*, the adjudication of legal liability is not a plenary power of the political branches. It is a judicial power; even when entrusted to Article I courts. *Freytag v. C.I.R.*, 501 U.S. 868, 889-891 (1991). Though it is reasonable to assume that military campaigns might be immune from judicial review, the courts are not an instrument of military policy. "The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution . . . ." *Korematsu v. United States*, 323 U.S. 214, 249 (1944) (Jackson, J. dissenting).

ii) Mr. al Bahlul's prosecution for speech has a chilling effect on Americans' access to information from abroad.

The courts must abide by the First Amendment, in particular, because its protection of speech is not simply, or even primarily, for the benefit of the defendant. It is for society at large. *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). Irrespective of Mr. al Bahlul's personal entitlement to self-expression, the government cannot use the courts to chill Americans'

access to information and ideas from abroad. *See Kleindienst*, 408 U.S., at 764-65.[3] In *Lamont v. Postmaster*, 381 U.S. 301, 305 (1965), for example, the Court struck down import restrictions on foreign political propaganda precisely because it operated "as a limitation on the unfettered exercise of the addressee's [viz. U.S. citizens'] First Amendment rights."

The particular facts of the government's case against Mr. al Bahlul substantially implicate the First Amendment rights of Americans. The three government witnesses, who were offered as *State of the Ummah*'s intended audience, were U.S. citizens. The government's "propaganda expert" testified that *State of the Ummah* is not only directed at a U.S. audience, it is in fact viewed widely in the Untied States. (*See, e.g.*, R. at 766, 813 & 815). The government's sentencing case centered on the reactions Americans had to seeing *State of the Ummah* on the Internet. (R. at 957-958).

The government cannot punish, and thereby chill, the dissemination of information that is protected by the First Amendment. This is true whether the restraint on speech comes at the point of delivery (as in *Lamont*) or the point of origin (as here). Otherwise, the "right to receive information and ideas," including from abroad, would be illusory. *Kleindienst*, 408 U.S., at 672. Not only could the government arrest aliens abroad for sending Americans letters or Internet postings, domestic politicians could (and would) sue foreign journalists for libel or other civil claims without having to overcome any First Amendment defenses, such as truth or lack of malice. *See, e.g.*, *McFarlane v. Ben-Menashe*, 1995 WL 129073 (D.D.C. 1995) (libel action by a U.S. politician against a foreign journalist). Such a rule would stifle Americans' ability to get

[3] In *Kleindienst*, the Court recognized that the petitioner could stand in to assert the First Amendment rights of American citizens and held that those rights were implicated by his exclusion. Ultimately, however, the Court declined to second guess the Attorney General's stated rationale for exclusion, which was rooted in the petitioner's past visa abuse. In so doing, it emphasized that it was declining to decide whether an unambiguous case of viewpoint discrimination could have survived First Amendment scrutiny. *Kleindienst*, 408 U. S. at 770.

information on precisely the areas of public concern, such as foreign policy, where the opinions of the rest of the world matter most to our own political decisions.

Agree or disagree with its message, *State of the Ummah* provides a valuable window into the anxieties and grievances of a substantial number of Muslims inside and outside the United States. It is a political argument on what has proven to be the dominant political debate of the past decade. If nothing else, it warrants the protection of the First Amendment so that Americans can have the information they need "to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

iii) The fact that Mr. al Bahlul's trial was held at GTMO is irrelevant with respect to the application of the First Amendment.

Lastly, the fact that Mr. al Bahlul's trial took place in GTMO has no bearing on the applicability of the First Amendment. In *Boumediene*, the Supreme Court squarely held that GTMO is U.S. territory. *Boumediene*, 128 S.Ct. at 2262. Like the other unincorporated territories acquired in the Spanish-American War, such as Puerto Rico and Guam, "the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace." *Id*. at 2254. In so holding, the Court cited the case of *Downs v. Bidwell*, 182 U.S. 244 (1901), which listed the rights of the First Amendment as among those "natural rights enforced in the Constitution," which apply by simple virtue of being "indispensible to a free government." *Id*. at 282.

b. *State of the Ummah* is protected speech as a matter of law.

i) Authoring political propaganda enjoys *per se* protection from prosecution under the First Amendment.

Black letter Constitutional law places freedom of expression in a "preferred position." *Murdock v. Pennsylvania*, 319, U.S. 105, 115 (1943). No expression is more protected from prosecution than political expression. The fact that the government has identified *State of the*

Ummah as a political argument means that it "is entitled to the most exacting degree of First Amendment protection." *F.C.C. v. League of Women Voters*, 468 U.S. 364, 375-76 (1984).

The Supreme Court has passed upon the protection afforded to foreign political propaganda, as such, on at least two occasions. In *Lamont*, discussed above, the Court struck down import restrictions on foreign political propaganda, without even doubting its protection under the First Amendment. It was as much a part of the "flow of ideas to the public" as union advocacy or religious leafleting. *Lamont*, 381 U.S. at 306. Likewise, in *Meese v. Keene*, 481 U.S. 465 (1987), the Court upheld a law that required the labeling of foreign political propaganda, because "the term 'political propaganda' does nothing to place regulated expressive materials 'beyond the pale of legitimate discourse.'" *Meese*, 481 U.S. at 480. In so holding, the Court stated that what invalidated the statute in *Lamont* was not the government's description of the mail as "propaganda," but the fact that Congress had sought to "prohibit, edit, or restrain the distribution of advocacy materials in an ostensible effort to protect the public from conversion, confusion or deceit." *Meese*, 481 U.S. at 480.

Indeed, the fact that people find *State of the Ummah* offensive is perhaps the best indication that it fills a necessary place in the marketplace of ideas. At a minimum, it invites public condemnation and a reaffirmation of the core values it ostensibly seeks to undermine. *See Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). The government's concession that *State of the Ummah* is "propaganda" and "political argument" alone, therefore, warrants reversal of Mr. al Bahlul's conviction on Charge II and remand for resentencing on any remaining charges.

ii) In order to prosecute the creator of a broadcast message for soliciting criminal conduct, the government must show that it rises to the level of incitement under *Brandenburg*.

Irrespective of whether propaganda enjoys *per se* immunity from prosecution, propaganda is still speech. The fact that it is hateful or offensive does nothing to make it illegal. *See United States v. Wilcox*, 66 M.J. 442, 446-47 (C.A.A.F. 2008) (racist Internet postings are protected by the First Amendment, unless prejudicial to good order and discipline). Because juries often fail to make this distinction and because of the substantial public interest in protecting free expression, appellate courts must make a *de novo* determination of whether speech falls into one of the recognized exceptions to the First Amendment. *Jacobellis v. State of Ohio*, 378 U.S. 184, 190 (1964). Since the government's argument rested on *State of the Ummah*'s power to inspire violence, this Court must determine *de novo* whether it meets the standard set forth in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

The facts of *Brandenburg* are similar to those here. The defendant was convicted on the basis of a filmed Ku Klux Klan rally in June 1964, which depicted hooded Klansmen brandishing firearms, parading around a burning cross and shouting racist epithets, such as "This is what we are going to do to the niggers," "Send the Jews back to Israel," "Bury the niggers," "We intend to do our part" and "Nigger will have to fight for every inch he gets from now on." The film showed the defendant proclaim to the armed crowd, "if our president, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." Brief for Appellant, at 4-6, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (No. 69-492), 1969 WL 136813.

Given the politics of civil rights in 1964 Ohio, brandishing weapons and calling for violence against minorities was not abstract. The Klan was responsible for scores of homicides, bombings and acts of terrorism during this period. In fact, less than a month before briefing was

submitted in *Brandenburg*, Ohio police disrupted a plot by members of the Klan's local chapter to assassinate the Justices of the Supreme Court. *Ex-Cop Here Quizzed on Klan Murder Plot,* CHICAGO TRIBUNE, Dec. 27, 1968.

The Court decided *Brandenburg*, therefore, fully aware that the advocacy of violence is often accompanied by violence. Nevertheless, it reversed the conviction on the ground that the government cannot "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447.

In its subsequent cases, the Court has clarified that for lawless action to be "imminent," the speaker must be addressing specific individuals, who are intended and likely to act without further deliberation. *Hess v. Indiana*, 414 U.S. 105, 108-109 (1973). Moreover, the advocacy of violence, even when violence has in fact occurred, cannot be prosecuted unless the government demonstrates an unambiguous causal link between the speech itself and the likely provocation of imminent lawlessness. *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982). The mere tendency of speech, especially broadcast messages, to encourage illegality is insufficient to sustain a conviction. *Cf. Lorillard Tobacco v. Reilly*, 533 U.S. 525 (2001).

iii) The record is unambiguous that *State of the Ummah* does not meet the standard for incitement.

Here, the government built its case on *State of the Ummah*'s purported power to:

> push these people to get them into a frenzy, a frenzy state where their anger and their resentment and their hatred would push them to be willing to sacrifice themselves, their families, their wealth, everything in their possession in order to carry out the mission of punishing the United States.

(R. at 793 (testimony of Mr. Kohlmann)). The government impugned its use of music to "increase [its] emotional appeal." (R. at 783 (testimony of Mr. Kohlmann)). Trial counsel described it as a "nonkinetic weapon," (R. at 893), "a weapon that will never cease to fire," (R. at

957-958), and a "virus" that "creates more hate" and "creates more terrorism." (R. at 954). "The message that that video sends every time it is played is blood. Blood. Destruction. Destruction." (R. at 954).

What trial counsel never did was introduce any evidence to show that *State of the Ummah* was likely to provoke, or was even capable of provoking, imminent illegality. In fact, the government's own witnesses testified to the contrary. The government called three witnesses named in Charge II; American citizens who had traveled to al Qaeda training camps and were shown *State of the Ummah*. The first witness, Mr. Goba, stated that the message he took from the video was the moral necessity to migrate to Afghanistan and prepare for war against the West. (R. at 638-639). The government's second witness, Mr. Taher, testified that when the video was shown at an al Qaeda guesthouse in Pakistan, where the audience was presumably self-selected to be most receptive to incitement, there "wasn't really that much of a reaction at the guesthouse, no." (R. at 666). Even when shown at a training camp in Afghanistan, the strongest emotional reactions came during "a clip of women being pushed around and beaten with batons." (R. at 667-668). The government's third witness, Mr. Alwan, confirmed this, (R. at 697-698), and further testified that rather than stifling deliberation, the video provoked an extensive debate between al Qaeda recruits over whether suicide bombing could be morally justified. (R. at 692-693). Far from provoking a "frenzy," both Mr. Taher and Mr. Alwan testified that watching the video made them less likely to join al Qaeda on ideological grounds. (R. at 671 (testimony of Mr. Taher); 695-696 (testimony of Mr. Alwan)).

What is also clear from their testimony (and from viewing *State of the Ummah*) is that it does not incite or even specify immediate action of any kind. By the government's own concession, it is propaganda directed at spreading a political message to a mass audience.

Indeed, trial counsel was left arguing that it had such vaguely stated objectives as to "motivate more attacks of a similar nature" to the COLE attack. (R. at 933). At worst, therefore, *State of the Ummah* is the kind of "advocacy of illegal action at some indefinite future time," that is insufficient as a matter of law to be prosecuted under *Brandenburg*. *Hess*, 414 U.S. at 108. Accordingly, Mr. al Bahlul's conviction on Charge II should be reversed and his case remanded for resentencing on any remaining charges.

c. The military judge failed to instruct the members on the standard for incitement or on the probative value of protected speech as evidence.

Even if there is an argument that *State of the Ummah* rises to the level of incitement, it was incumbent upon the military judge to instruct the members that Mr. al Bahlul could only be found guilty if the video was intended and likely to bring about specific and imminent illegality. *Street v. United States*, 394 U.S. 576 (1969) . The military judge did nothing of the kind. With respect to Charge II, the military judge's instructions defined the offense perfunctorily. (R. at 860). He gave no limiting instruction that the object offenses had to be specifically identified, imminent, or likely to come about. In fact, the military judge gave no limiting instructions of any kind.[4] This was a clear abdication of the "military judge's independent duty to determine and deliver appropriate instructions. . . ." *Westmoreland*, 31 M.J. at 164.

Trial counsel's closing made the need for limiting instructions both more apparent and more essential. Trial counsel repeatedly and erroneously asserted that Mr. al Bahlul's criminality was rooted in his *advocacy* of violence. "He *advocates* attacking civilians, he *advocates* attacking civilian objects, he *advocates* attacks, murder, and destruction of property in violation of the law of war through suicide operations." (R. at 884 (emphasis added); *see also* R.

[4] Notably, the instructions the military judge did give on Charge II were replete with errors. (R. at 861, 863, 866, & 869). They were apparently adapted from Charge I. (R. at 881-882). While ultimately corrected, the confusion of the members was apparent. (R. at 906-907). Likewise, the military judge erroneously included "propaganda" in the definition "material support," which implied that propaganda was illicit. *See* III(b) *infra*.

at 885-886). *Compare Claiborne Hardware*, 458 U.S. at 909. Only occasionally did trial counsel even mention the word "incite," which is irrelevant since neither the instructions nor the charge sheet "in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action." *Brandenburg*, 395 U.S. at 448.

At sentencing, the government's witnesses testified principally about how offended they were after seeing *State of the Ummah* on the Internet. This testimony had no probative value. "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street*, 394 U.S. at 592; *see also Dawson v. Delaware*, 503 U.S. 159 (1992). Irrespective of whether it should have been admitted, the military judge had an independent duty to provide guidance on how to evaluate its legal significance. *United States v. Greaves*, 46 M.J. 133, 139 (C.A.A.F. 1997).

Ultimately, what makes the military judge's failure to give any First Amendment instructions so prejudicial is that the government's case was an unabashed prosecution of Mr. al Bahlul for his ideas. Trial counsel's closing summed it up well:

> The chief evidence that you have in this case is a product of the accused himself, the video [*State of the Ummah*]. You know from the evidence that you heard that this contains the thoughts, the beliefs, the ideals of the accused, which also happen to accord with the leader of the organization that he joined in 1999, al Qaeda.

(R. at 892-93).

Even Mr. al Bahlul's book collection was introduced as evidence against him. (R. at 900).[5] While courts have allowed books to be introduced into evidence to corroborate motive,

[5] Notably, the government admitted only the covers of the books, which had titles such as "The Day of Rage," (R. at AE 39-O), "America's intervention in the Islamic nations," (R. at AE 39-H), and "The importance of the emerging information war and its impact on the Middle East." (R. at AE 39-L). According to trial counsel, all the government wanted the members to know was "the subject of the book which is shown by the title." (R. at 292).

they cannot be used to vilify the accused. It is precisely in such circumstances that federal courts have required jury instructions, which emphasize that the accused's political beliefs are not on trial. *See, e.g.*, *United States v. Curtin*, 489 F.3d 935, 941 (9th Cir. 2007); *United States v. Salameh*, 152 F.3d 88, 112 (2d Cir. 1998).

Mr. al Bahlul's conviction on Charge II and of overt acts in support of Charges I and III rested upon his creation of *State of the Ummah*. (R. at AE 74). Nothing on its face nor the record shows that it rises to the level of criminal incitement. If there is any doubt or if there is an alternative theory of liability to sustain his conviction, it was necessary for the members to make that determination and to make it on the record. *Street*, 394 U.S. at 585. They did not do so. The military judge gave them no guidance on how to do so. Trial counsel encouraged them to turn al Bahlul's trial into a trial of his ideology. From being told that Mr. al Bahlul spread a "virus" that "creates more terrorism" to being offered his personal library as incriminating evidence, there is little doubt that this is what the members did. At a minimum, therefore, Mr. al Bahlul's conviction and sentence should be vacated and his case remanded for retrial.

II. MR. AL BAHLUL'S CONVICTION MUST BE REVERSED BECAUSE NONE OF THE CHARGES ARE WAR CRIMES TRIABLE BY MILITARY COMMISSION.

Military commissions derive their authority from Congress' enumerated power under the Define and Punish Clause. Accordingly, their jurisdiction only extends to war crimes. Whether a crime is a war crime is a question of international, not domestic law. The charges against Mr. al Bahlul are inchoate offenses that are not recognized as violations of international law. Indeed, subsequent to his trial, the government has represented to Congress that one of the charges of which he was convicted, Material Support for Terrorism ("Material Support"), is not in fact triable by military commission.

a. Because they are Article I courts, military commissions have subject matter jurisdiction over war crimes only.

Article III limits Congress' power to establish federal courts of general jurisdiction, so called "constitutional courts" or "Article III courts." U.S. CONST., ART. III § 2. Article III does not, however, limit Congress' ability to create special-purpose courts to implement its other enumerated powers, so called "legislative courts" or "Article I courts". *Ex parte Bakelite Corporation*, 279 U.S. 438, 449 (1929). Military courts are Article I courts. *United States v. Denedo*, 129 S.Ct. 2213, 2221 (2009). Courts-martial are established pursuant to Congress' authority to regulate the Armed forces. *Weiss v. United States*, 510 U.S. 163, 166-169 (1994). Military commissions are established pursuant to Congress' authority to "define and punish offenses against the laws of nations." U.S. CONST., ART. I § 8, cl. 10; *Ex parte Quirin*, 317 U.S. 1, 26-28 (1942).

As Article I courts, military commissions are "courts of special and limited jurisdiction." *Cf. Runkle v. United States*, 122 U.S. 543, 555 (1887). Because their only purpose is to "punish offenses against the laws of nations," their subject matter jurisdiction is necessarily limited to those offenses. *See Hamdan*, 548 U.S. at 597 (plurality op.); *Hamdan*, 548 U.S. at 683 (Thomas J., dissenting); *Quirin*, 317 U.S. at 28; *see also* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 839 (2d Ed. 1920); Testimony of David Kris, Assistant Attorney General, at 3 ("The President has made clear that military commissions are to be used only to prosecute law of war offenses.").[6]

[6] *Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond*: *Hearing before the Senate Comm. on Judiciary*, 111th Cong. (28 July 2009) *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=4002&wit_id=8156

b. Congress cannot criminalize conduct as a war crime if the conduct is not recognized as a violation of international law.

The Define and Punish Clause is not a plenary grant to Congress to define any and all conduct as a violation of the law of nations. Since the founding, the purpose of the Define and Punish Clause was understood as enabling Congress to conform U.S. law to international law in the regulation of international crime and commerce. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1160. When Attorney General James Speed rendered an opinion on the legality of military commissions for the trial of President Lincoln's assassins, he took for granted that "Congress has the power to define, *not to make, the laws of nations* . . . . Hence Congress may define those laws, but can not abrogate them." James Speed, *Opinion of the Constitutional Power of the Military to Try and Execute the Assassins of the President*, 11 U.S. Op. Atty. Gen. 297 (1865) (emphasis added).

When Congress legislates for military commissions, it can only vest them with jurisdiction over offenses that are recognized as violations of the law of war. *Quirin*, 317 U.S. at 29. The law of war is a body of international law that governs armed conflicts, and the phrase "law of war" necessarily refers to a body of international law. *Ex parte Valladigham*, 1 Wall. 243, 249 (1864). Whether or not a crime is a war crime is therefore a judicial question on the content of international law. *See The Nereide*, 9 Cranch 388, 423 (1815) (Marshall, C.J.); *United States v. Furlong*, 5 Wheat. 184, 198 (1820).

The standard courts must use to determine whether or not an offense is a war crime is well established. The law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980), (*citing United States v. Smith*, 5 Wheat. 153, 160-61 (1820)). Most importantly, a

war crime must "grow, by the general assent of civilized nations, into a settled rule of international law." *The Paquete Habana*, 175 U.S. 677, 694 (1900).

c. Providing Material Support for Terrorism is not a war crime triable by military commission.

Duly authorized agents of the government have represented to Congress that the Material Support cannot plausibly be described as a war crime. In testimony before various Congressional committees, Assistant Attorney General Kris has stated that "[a]lthough identifying traditional law of war offenses can be a difficult legal and historical exercise, our experts believe that there is a significant likelihood that appellate courts will ultimately conclude that material support for terrorism is not a traditional law of war offense . . . ."[7]

As is laid out in detail in section III(a)(ii) *infra*, Material Support is a novel domestic crime. This very novelty undercuts any serious argument that it has obtained the "general assent of civilized nations" as a war crime. Even in the context of the War on Terror, no one claimed that Material Support offenses were triable by military commission until the passage of the MCA. This included both systems before which Mr. al Bahlul was previously charged. (Military Commission Instruction No. 2, Ex. F). Likewise, the White House's proposed draft of the MCA listed no Material Support offenses. (Enemy Combatant Military Commissions Act § 247, Ex. G).

Mr. al Bahlul could not be tried by military commission for Material Support when he was first charged in 2004 and the government has all but conceded he could not be charged with it in 2009. His conviction on Charge III must, therefore, be reversed and his case remanded for resentencing on any remaining charges.

[7] *See supra* note 6 at 3.

d. Conspiracy is not a war crime triable by military commission.

When the Supreme Court invalidated the previous military commission system, in which Mr. al Bahlul was charged solely with Conspiracy, a plurality of the court devoted fifteen pages of its opinion to demonstrating how the government failed to make even a "'merely colorable' case for inclusion of conspiracy among those offenses cognizable by law-of-war military commission." *Hamdan*, 548 U.S. at 598-613. In fact, no law-of-war tribunal since Nuremberg has prosecuted a conspiracy to commit future war crimes as a completed offense. *Id*. at 610 (plurality op.); *Prosecutor v. Milutinovi*, Decision on Dragoljub Ojdani's Motion Challenging Jurisdiction—Joint Criminal Enterprise, Case No. IT–99–37–AR72, ¶ 26 (21 May 2003).[8]

This is because international law does not recognize inchoate war crimes. *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, U.N. GAOR, 5th Session, Supp. No. 12, Principle VII, U.N. Doc. A/1316 (1950) (only complicity in the *commission* of a crime is a crime); *Hamdan*, 548 U.S. at 604; WINTHROP at 841. In the context of an armed conflict, the ever-present danger of guilt by association with the enemy is made far more significant if liability can be imposed for unaccomplished crimes.

Mr. al Bahlul was found guilty on Charge I for a broad conspiracy supported by 11 overt acts. None of these overt acts, however, were themselves war crimes. His conviction on Charge I must therefore be reversed and his case remanded for resentencing on any remaining charges.

e. Solicitation is not a war crime triable by military commission.

The analysis that is fatal to Conspiracy is equally fatal to Solicitation. The law of war does not recognize inchoate war crimes. Indeed, the elements of Solicitation and Conspiracy are

[8] The only superficial exception is with respect to the crimes of genocide and aggressive war. *See Hamdan*, 548 U.S. at 610 (plurality op.). Both genocide and aggression, however, are policy crimes, not war crimes.

largely identical, with solicitation being all but subsumed by the crime of conspiracy. *Cf. United States v. Carter*, 30 M.J. 179, 181-182 **(**C.M.A. 1990). Mr. al Bahlul's conviction on Charge II must therefore be reversed and his case remanded for resentencing on any remaining charges.

III. CHARGE III VIOLATED THE EX POST FACTO CLAUSE AND WAS ERRONEOUSLY DEFINED BY THE MILITARY JUDGE.

a. Mr. al Bahlul's conviction of Material Support for Terrorism must be reversed because it was not a crime at the time of the relevant conduct.

Criminal defendants can only be tried under the law that existed at the time of their alleged offenses. Mr. al Bahlul was convicted of providing material support to a terrorist organization in violation of 10 U.S.C. § 950v(25) for conduct in Afghanistan and Pakistan that spanned from 1999 until December 2001. Providing material support to a terrorist organization, however, was not an extraterritorial crime in any jurisdiction until 2004.

i) The Ex Post Facto Clause limits courts' subject matter jurisdiction to crimes that were triable at the time of the offense.

Article I, § 9, cl. 3 of the Constitution, the Ex Post Facto Clause, is part of the same sentence that forbids bills of attainder and immediately follows the Constitutional limitation on the suspension of *habeas corpus*. It was understood by the Founders to be among the most significant rule of law guarantees in the Constitution. *See, e.g.*, THE FEDERALIST, No. 84 (Hamilton). Any law which removes defenses, imposes liability or otherwise makes more severe the punishment for past conduct is prohibited as an *ex post facto* application of the laws. *Collins v. Youngblood*, 497 U.S. 37, 42 (1990).

ii) The fifteen year legislative history of Material Support offenses confirms that providing material support to a terrorist organization was not a crime at any time relevant to Charge III.

The first Material Support offense was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322 § 120005 (1994) ("1994 Crime Bill") (codified

at 18 U.S.C. § 2339A). The 1994 Crime Bill criminalized the provision of "material support," which is a defined term, for the perpetration of a terrorist attack. The President's objective in having this included in the 1994 Crime Bill was to "oppose activities in the United States in support of terrorist violence overseas." Assistant Secretary of State for Legislative Affairs Wendy Sherman, Letter to Rep. Lee Hamilton, 16 May 1994, 139 Cong. Rec. E1519-01. Accordingly, it applied only within the United States. 1994 Crime Bill § 120005(a).

In 1996, Congress enacted a second Material Support offense that proscribed providing material support to terrorist groups. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 303(a) (1996) (codified at 18 U.S.C. § 2339B). Congress equally limited the reach of this new offense to people acting "within the United States or subject to the jurisdiction of the United States." *Id.* Congress found that "some foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds within the United States, or use the United States as a conduit for the receipt of funds raised in other nations . . . ." *Id*. at 301(a)(6)-(7). Its purpose was therefore "to prevent persons within the United States, or subject to the jurisdiction of the United States, from providing material support or resources to foreign organizations that engage in terrorist activities." *Id*. at 301(b).

In the years after September 11th Attack, Congress substantially revised and expanded the class of Material Support offenses. The first major change was to turn § 2339A, materially supporting a terrorist attack, into an extraterritorial crime. USA PATRIOT Act, Pub. L. 107-56 § 805(1)(a)(A) (2001). Then in 2002, Congress created another Material Support offense that proscribed the provision of financial services in support of terrorist attacks. Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Pub. L. 107-197 § 202 (2002) (codified at 18 U.S.C. § 2339C).

Only in 2004 did Congress refocus on the use of Material Support offenses to prosecute terrorist organizations, as such, as opposed to terrorist acts. In so doing, it created another Material Support offense that prohibited individuals from receiving military-style training from foreign terrorist organizations. Material Support to Terrorism Prohibition Enhancement Act of 2004, Pub. L. 108-458 § 6602 (2004) (codified at 18 U.S.C. § 2339D). It also re-codified § 2339B as an extraterritorial crime. *Id*. at § 6603(c).

The MCA, in turn, was passed in October 2006 and included the substantive offense of Material Support that now underlies Charge III. 10 U.S.C. § 950v(b)(25). This general Material Support offense expressly incorporates the definition of "material support or resources" from Title 18 and combines two Material Support offenses, 18 U.S.C. §§ 2339A and 2339B, as distinct theories of liability.

Charge III alleged only the § 2339B theory of liability. The specification lists various overt acts spanning from 1999-2001 to support the allegation that Mr. al Bahlul provided material support to a terrorist organization. Charge III, therefore, alleges an offense that is contained in a law that was passed six years after the conduct took place, nearly five years after Mr. al Bahlul was in custody, and two years after it became a federal crime (which was itself enacted almost a year after he was first charged before a military commission). It is difficult to imagine a clearer example of the *ex post facto* application of a law.

iii) That the provision of material support to a terrorist organization pre-dated most of the alleged conduct as a domestic crime is irrelevant.

Retroactively expanding the jurisdictional scope of a crime is as much a violation of the Ex Post Facto Clause as retroactively criminalizing entirely innocent conduct, since "it *creates* jurisdiction where none previously existed." *Cf. Hughes Aircraft Co. v. United States ex rel.*

Schumer, 520 U.S. 939, 951 (1997) (emphasis in original). Such a law impermissibly "expands the scope of a criminal prohibition after the act is done." *Collins*, 497 U.S. at 49.

Expanding the jurisdictional scope of § 2339B not only meant that more people could be prosecuted, it fundamentally altered what the law sought to accomplish. The whole class of Material Support offenses was originally designed to prevent the use of U.S. territory and institutions as a staging ground for international terrorism. The transformation of § 2339B into an extraterritorial crime criminalized terrorist affiliations across the entire world. Far from its "very narrow" roots, it became a modern act of proscription. While a possibly appropriate response to expand the reach of U.S. law enforcement, nothing like it existed at any time relevant to Charge III. The United States recognized no crime that entailed belonging to or supporting an international terrorist organization abroad.

In determining whether Charge III is *ex post facto*, therefore, this Court needs to answer only one question – Could Mr. al Bahlul have been charged with this crime, as alleged, when he was captured in December 2001? Since the answer is no, his conviction on Charge III must be reversed and his case remanded for resentencing on any remaining charges.

b. The military judge gave the members erroneous instructions on what constitutes "material support."

The MCA defines "material support" by express incorporation of 18 U.S.C. § 2339A. 10 U.S.C. § 950v(25)(B). The Manual for Military Commissions copies wholesale the definition found in 18 U.S.C. § 2339A. M.M.C., Part IV, § 6(25)(c). When instructing the members, the military judge read this definition verbatim, except he inserted, "propaganda, recruiting materials," in the middle. (R. at 858). Neither "propaganda" nor "recruiting materials" are included in 18 U.S.C. § 2339A or the M.M.C.

Given that the government's case rested upon Mr. al Bahlul's preparation of propaganda, this was plain and prejudicial error. *Westmoreland*, 31 M.J. at 164-165. It was, in essence, a finding by the military judge, communicated to the members, that making propaganda constituted material support *per se*, when it was not. *Cf. United States v. Gaudin*, 515 U.S. 506 (1995) ("materiality" is a question for the jury). At a minimum, therefore, Mr. al Bahlul's conviction on Charge III must be vacated and remanded for retrial.

IV. THE MILITARY COMMISSIONS ACT IS AN UNCONSTITUTIONAL BILL OF ATTAINDER.

Article I, § 9, cl. 3 of the Constitution deprives Congress of the power to issue bills of attainder.[9] Bills of attainder are defined as any "legislative punishment, of any form or severity, of specifically designated persons or groups." *United States v. Brown*, 381 U.S. 437, 447 (1965). Their use dates back well into English Parliamentary history, "as a device often resorted to in sixteenth, seventeenth and eighteenth century England for dealing with persons who had attempted, or threatened to attempt, to overthrow the government." *Id.* at 441; *see also Selective Service System v. Minn. Public Interest Research Group*, 468 U.S. 841, 852 (1984).

The modern inquiry for whether a law is a bill of attainder is whether it has three definitional elements —"specificity in identification, punishment, and lack of judicial trial." *Brown*, 381 U.S. at 441, n.30. The MCA fails all three. It identifies Mr. al Bahlul as a member of a discrete group of individuals (i.e., GTMO detainees) on the basis of his past conduct. It deprives him of rights for nothing other than a punitive purpose and it does so by simple operation of identifying him as an "alien unlawful enemy combatant."

a. The MCA applies to a discrete group of individuals defined by their past conduct.

What distinguishes bills of attainder from Congress' legitimate authority to make

[9] Historically, bills of attainder were legislative death sentences. Lesser impositions were accomplished by "bills of pains and penalties." The Constitutional prohibition encompasses both. *Drehman v. Stifle*, 75 U.S. 595, 601 (1869).

distinctions between classes of offenders is whether Congress is legislating "by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied." *Brown*, 381 U.S. at 461. Congress cannot legislate against specific people or groups by name, *United States v. Lovett*, 328 U.S. 303 (1946), or in "terms of conduct which, because it is past conduct, operates only as a designation of particular persons," *Id*. at 315. Hence, a law is a bill of attainder if there is nothing an individual can do prospectively to avoid the law's consequences. *Selective Service*, 468 U.S. at 848.

The group the MCA singles out is the class of detainees held at GTMO on suspicion of having opposed the United States in the War on Terror. The MCA identifies this group specifically as "alien unlawful enemy combatants" ("AUEC") 10 U.S.C. § 948a (1)(A), and the revisions to the MCA currently before Congress identify this group in largely identical terms as "unprivileged belligerents." *See* S.1391 11th Cong. § 948(a)(7) (2009). With the exception of alienage, Mr. al Bahlul's status as an AUEC turns solely on his past conduct, to wit, the allegation that he "has engaged in hostilities or . . . has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces." 10 U.S.C. § 948a(1)(A)(i). AUEC status is therefore nothing other than a reverse-engineered definition, designed to impose the law's burdens upon GTMO detainees uniquely.

b. The MCA imposes punishment by depriving AUECs of pre-existing rights.

"In deciding whether a statute inflicts forbidden punishment, we have recognized three necessary inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3)

whether the legislative record 'evinces a congressional intent to punish.'" *Selective Service*, 468 U.S. at 852 (1984). Under any of these, the MCA is nothing other than punitive legislation.

i) The deprivation of pre-existing rights is the historical definition of punishment.

The best indication of legislative punishment's historical meaning comes from the first case in which the Supreme Court considered the Bill of Attainder Clause at length, *Cummings v. Missouri*, 71 U.S. 277, 323 (1866). Following the Civil War, Missouri effectively barred individuals from serving in most professions if they he had ever engaged in or materially supported armed hostilities against the United States. *Id.* at 316-17. In striking down the law, the Court held that the Bill of Attainder Clause broadly prohibits any legislation that imposes a "deprivation of any rights, civil or political, previously enjoyed" without trial. *Id.* at 320.

Of particular relevance here is *Pierce v. Clarskadon*, 83 U.S. 234 (1872). In *Pierce*, West Virginia passed a statute that effectively barred civil defendants, who had engaged in or materially supported hostilities against the United States, from reopening default judgments rendered against them during the Civil War. Relying on *Cummings*, the Court summarily struck this statute down for depriving defendants of the ability to assert previously available rights in the courts.

Congress unconstitutionally denied Mr. al Bahlul the right to petition for release through habeas corpus, *Boumediene*, 128 S.Ct. at 2275, and continues to deprive him of the right to challenge the conditions of his confinement. *See In re Guantanamo Bay Detainee Litigation*, 570 F.Supp.2d 13, 19 (D.D.C. 2008). By conferring military commission jurisdiction over him, Congress deprived him of the right against self-incrimination, 10 U.S.C. § 948r; M.C.R.E. 304(a)(3), and the right to fully confront the evidence against him before being branded as a war criminal and sentenced to life imprisonment. 10 U.S.C. §§ 948b, 949a; R.M.C. 304, 801, 901.

Congress barred him from collaterally attacking his prosecution in federal court, 10 U.S.C. § 950j, despite the fact that GTMO detainees previously enjoyed (and successfully asserted) the right to challenge the legality of a military commission to "try [them] at all." *Hamdan*, 420 U.S. at 763. And despite the fact that Congress diverted him to a "military" commission, Congress deprived him of the ability to assert rights under the Geneva Conventions. 10 U.S.C. § 948b(g).

Even the labels "Alien *Unlawful* Enemy Combatant" and "*Unprivileged* Belligerent" evince a legislative determination of guilt. *Cf. Lovett*, 328 U.S. at 314; *but see Paul v. Davies*, 424 U.S. 693 (1976). Overtly stigmatizing in their own right, Congress uses them as automatic triggers for the deprivation of previously enjoyed rights.

ii) AUEC status furthers no nonpunitive legislative purpose.

In evaluating whether a law imposes legislative punishment, the Court also engages in "a functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." *Nixon v. Administrator of the General Services*, 433 U.S. 425, 476 (1977). According to remarks from President Bush on the day the MCA was introduced, its purpose was to "prosecute suspected terrorist leaders and operatives who have now been transferred to Guantanamo . . . ."[10] The use of AUEC status as the basis for military commission jurisdiction was simply a legislative device to overturn the *Hamdan* decision and to channel Guantanamo detainees, as such, into a truncated criminal justice system.

Equally, the rights stripping provisions of the MCA were specifically intended to disrupt ongoing Guantanamo litigation. Prior to *Hamdan*, the Administration took the position that for detainees, such as Mr. al Bahlul, "none of the provisions of Geneva apply." (Memorandum of

[10] President Discusses Creation of Military Commissions to Try Suspected Terrorists (6 September 2006) *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html

the President, Ex. H, at A84). The Supreme Court rejected this position, *Hamdan*, 548 U.S. at 626, and so the MCA sought to deprive detainees of the ability to assert rights under the Geneva Conventions. 10 U.S.C. § 948b(g). Likewise, the Administration had taken the position that detainees had no right to seek *habeas corpus*. The Supreme Court rejected this position first in *Rasul v. Bush*, 542 U.S. 466 (2004), and then again in *Hamdan*, 548 U.S. at 575-76. So the MCA sought to deprive detainees of the right to petition for habeas corpus, even in pending cases. MCA § 7.

Systematically, therefore, the MCA sought to reverse holdings of the Supreme Court as to the rights enjoyed by a known class of litigants. Legislating those rights away after the fact is precisely the breach of the separation of powers – the substitution of the legislature's judgment for that of the courts in the disposition of individual cases – that the Bill of Attainder Clause was designed to prevent. *See, e.g.*, *Carmell v. Texas*, 529 U.S. 513, 526-30 (2000) (describing at length the attainder of Sir John Fenwick, who prevailed in the courts only to be attainted by the Parliament in 1697).

iii) Congress created AUEC status with a punitive intention.

Finally, courts can and should look to the legislative history to inquire "whether the legislative record evinces a congressional intent to punish." *Nixon*, 433 U.S. at 478. In *Nixon*, for example, the former president challenged a law targeted at the preservation of his records. In ruling against him, the Court cited the Congressional record which "cast no aspersions on appellant's personal conduct and contain no condemnation of his behavior as meriting the infliction of punishment." *Id*. at 479.

The legislative history of the MCA, by way of contrast, reveals little more than aspersions and condemnations of the class of AUEC. Sen. Sessions was explicit:

> And let's be sure that these extraordinary protections that we provide to American soldiers and American civilians, because we live in such a safe nation that we can take these chances and give these extra rights, that we don't give them to people who have no respect for our law and are committed to killing innocent men and women and children.

(2006 SASC HEARING, Ex. I; A111-12).

Even a cursory review of the floor debate reveals that Congress' two objectives were to overturn the *Hamdan* decision and to brand all AUEC as undeserving of due process:

- "[The MCA] addresses an issue that Supreme Court created in the *Hamdan* case. The Court in *Hamdan* decided that Common Article 3 of the Geneva Conventions – a[n] article that many assumed only applied to regular armies – applies to terrorist organizations, like al Qaeda." 152 Cong. Rec. H7538 (statement of Rep. McHugh).

- "Different considerations apply when you are talking about a declared enemy of the U.S., and particularly an unlawful combatant, someone who doesn't wear the uniform, someone who doesn't respect the law of wars, and who targets innocent civilians in the pursuit of their ideology." 152 Cong. Rec. S10274 (statement of Sen. Cornyn).

- "The Supreme Court case which brought about the need for this legislation deals with *Hamdan*. . . . Giving unlawful enemy combatants such as these U.S. domestic habeas rights is inappropriate. These people are not U.S. citizens, arrested in the U.S. on some civil offense; they are, by definition, aliens engaged in or supporting terrorist hostilities against the U.S., and doing so in violation of the laws of the war." 152 Cong. Rec. S10274 (statement of Sen. Bond).

- "Mr. President, it is essential that we protect human dignity at every opportunity, but we have gone well beyond that with this legislation. The legislation before us responds to the Supreme Court's decision in *Hamdan* and seeks to protect national security while ensuring that the terrorists who seek to destroy America are properly dealt with. This bill affords these unlawful enemy combatants rights that they themselves would never consider granting American soldiers. It is beyond reasonable, beyond fair, and beyond time for Congress to act." 152 Cong. Rec. S10401 (statement of Sen. Grassley).

c. Congress deprived Mr. al Bahlul of fundamental rights without judicial trial.

In *Lovett*, the Supreme Court held that the Bill of Attainder Clause's basic purpose was to ensure that rights deprivations are only meted out by "duly constituted courts." In explaining what a "duly constituted court" was, the Court listed a number of familiar criteria:

> An accused in court must be tried by an impartial jury, has a right to be represented by counsel, he must be clearly informed of the charge against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him, he must not be compelled to incriminate himself, he cannot twice be put in jeopardy for the same offense, and even after conviction no cruel and unusual punishment can be inflicted upon him.

Lovett, 328 U.S. at 317-318.

Again and again, the Bill of Attainder Clause has served as the constitutional bulwark against the very special trials and star chambers that the Founders had endured under English rule. *Cf. Crawford v. Washington*, 541 U.S. 36, 43-47 (2004) (discussing the right to confrontation in England being denied in the Star Chamber and in attainder proceedings). Like the requirement of a "regularly constituted court" in the Geneva Conventions, the Bill of Attainder Clause ensures that rights deprivations are imposed by pre-existing procedures, devised and implemented before times of "popular clamor." *Brown*, 381 U.S. at 445; *see also* Int'l Comm. of Red Cross, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 355 (2005) (A "regularly constituted court" must be "established and organized in accordance with the laws and procedures already in force in a country.").

AUEC status, by contrast, was devised in the midst of an intensely contested Congressional election and the fifth anniversary of the September 11th Attacks. The legislators who voted for it did not even attempt to conceal the fact that it was "the substitution of a legislative for a judicial determination of guilt." *De Veau v. Braisted*, 363 U.S. 144, 160 (1960). Congress legislated away Mr. al Bahlul's fundamental rights on the presupposition of his past conduct. This makes the MCA a bill of attainder in the historical and the modern sense. Accordingly, his conviction and sentence must be reversed.

V. THE MILITARY COMMISSIONS ACT DISCRIMINATES AGAINST ALIENS IN VIOLATION OF THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT.

The MCA discriminates on the basis of a suspect classification by limiting personal jurisdiction to aliens. It fails strict scrutiny because its targeting of aliens alone for prosecution is not narrowly tailored nor does it serve any compelling governmental interest. Rather, the legislative history confirms that Congress sought to deprive aliens of fundamental rights and privileges on the belief that aliens were not deserving of such rights.

a. The MCA's targeting of aliens for prosecution is subject to strict scrutiny.

The MCA limits the personal jurisdiction of the military commissions to "*alien* unlawful enemy combatants," 10 U.S.C. §§ 948c, 948d, and therefore targets aliens, and aliens alone, for criminal prosecution. "[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson,* 403 U.S. 365, 372 (1971). Alienage is "so seldom relevant to the achievement of any legitimate state interest that laws grounded in [those] considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." *City of Cleburne v. Cleburne Living Ctr*, 473 U.S. 432, 440 (1985).

This is especially true where, as here, discrimination compromises the integrity of a criminal trial. *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) ("Both equal protection and due process emphasize the central aim of our entire judicial system – all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court."). The Government therefore must show that the MCA's discrimination against aliens is

supported by a "compelling state interest" and that the means chosen are "narrowly tailored" to achieving that goal. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

b. The MCA's targeting of aliens fails strict scrutiny.

i) Prosecuting aliens alone is invidious discrimination for no other purpose than to avoid the political accountability that would result if citizens could be tried.

The members of Congress who voted for this provision of the MCA did so with an avowedly discriminatory purpose. The legislative history reveals that the drafters' desire to target aliens, and aliens alone, bore no relationship to their degree of dangerousness or culpability compared to citizen terrorists. In fact, the draft of the MCA submitted by the White House applied to aliens and citizens alike. (Enemy Combatant Military Commissions Act § 202, Ex. G). It was only *after* the MCA passed through committee that it ceased to be a law of general applicability and lawmakers were candid about the reason for this change.[11] By targeting aliens alone, they could avoid "the political retribution that might be visited upon them if larger numbers were affected." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

ii) Prosecuting aliens alone serves no compelling state interest.

Belying any rational (let alone compelling) government interest in prosecuting aliens alone, both historically and at present, citizens and non-citizens violate the law of war and "pose the same threat" to national security. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004). Military

[11] *See, e.g.*, Statement of Sen. James Inhofe (2006 SASC HEARING Ex. I, at A96) ("I want to make sure that we have everything in place here in Congress to make sure that the attorney-client privileges are not given to the detainees, at least not to the extent that they be to American citizens."); 152 Cong. Rec. S10250 (statement of Sen. Warner) ("It is wrong to say that this provision captures any U.S. citizens. It does not. It is only directed at aliens—aliens, not U.S. citizens – bomb-makers, wherever they are in the world; those who provide the money to carry out the terrorism, wherever they are – again, only aliens . . . ."); *id.* at S10274 (statement of Sen. Bond) ("These people are not U.S. citizens, arrested in the U.S. on some civil offense; they are, by definition, aliens engaged in or supporting terrorist hostilities against the U.S., and doing so in violation of the laws of war."); *id.* at S10251 (statement of Sen. Graham) ("Under no circumstance can an American citizen be tried in a military commission.").

commissions are borne of "military necessity," *Hamdan*, 548 U.S. at 612 (plurality op.), and that necessity has nothing to do with the citizenship of the accused. The Supreme Court has twice entertained claims by U.S. citizens – including one formerly held at GTMO – who were held for conduct that would subject a similarly situated alien to trial by military commission. *See Padilla v. Rumsfeld*, 542 U.S. 426 (2004); *Hamdi*, 542 U.S. at 519 (2004).[12]

As former Attorney General Gonzales himself warned, "[t]he threat of homegrown terrorist cells . . . may be as dangerous as groups like al Qaeda, if not more so."[13] There is no reason to believe that the governmental interest served by targeting aliens alone is any more compelling than what the MCA's supporters in Congress said it was. That is, the belief that GTMO detainees "do not deserve the same panoply of rights preserved for American citizens in our legal system." 152 Cong. Rec. S10395 (statement of Sen. Cornyn).

iii) Prosecuting aliens alone is not narrowly tailored.

The MCA is not and was never intended to be "separate but equal." It is a regime of selective-prosecution *per se*. It intentionally denies aliens basic protections to which they would be entitled if they were prosecuted in either federal court or under the UCMJ. "A criminal law may not be 'directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of equal protection of the law." *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (*quoting Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

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[12] The House of Lords struck down similar alienage discrimination present in an English detention law. *A v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, [2005] 2 A.C. 68, at 75-76; *see also id.* at 76-78 (Lord Nicholls) ("The Government has vouchsafed no persuasive explanation of why national security calls for a power of indefinite detention in one case but not the other.").

[13] Alberto Gonzalez, U.S. Att'y Gen., Remarks at the World Affairs Council of Pittsburgh on Stopping Terrorists Before They Strike: The Justice Department's Power of Prevention (16 August 2006) *available at* http://www.usdoj.gov/archive/ag/speeches/2006/ag_speech_060816.html.

As detailed in section IV(b)(i) *supra*, the MCA deprives aliens, and only aliens, of substantive and procedural rights and nothing about the fact that Mr. al Bahlul is Yemeni makes any of these deprivations relevant (let alone narrowly tailored) to a compelling state interest. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 911 (1986). The MCA's approach is a blunderbuss; reserving for aliens alone trial by military commission for crimes that U.S. citizens commit and for which they are prosecuted.

The very oddness of the MCA is its profound inconsistency with our history. In all previous conflicts, "the principle of procedural parity was espoused as a background assumption." *Hamdan*, 548 U.S. at 617. Even in the atmosphere of crisis that defined WWII, where invidious discrimination was permitted in the name of national security, *see Korematsu v. United States*, 323 U.S. 214 (1944), we did not establish special tribunals to try aliens apart from citizens. In *Quirin*, the German saboteurs were tried in the same military commission as their American co-conspirator. *Quirin*, 317 U.S. at 20. The MCA is therefore without precedent and its sweeping targeting of aliens alone for special prosecution bears no rational relationship to any governmental interest that the Constitution condones.

Under the Constitution, "no *person* shall be . . . deprived of life, liberty, or property, without due process of the law." U.S. CONST. AMEND. V (emphasis added). As a nation populated almost entirely by immigration, the Constitution is built upon a simple premise "that all persons similarly situated should be treated alike." *Cleburne*, 473 U.S. at 439. To subvert that principle on the belief that aliens are only entitled to the due process that they "deserve" is as unnecessary as it is unconstitutional. Accordingly, Mr. al Bahlul's conviction and sentence can and should be reversed on this ground alone.

CONCLUSION

Wherefore, appellant respectfully requests that this Court grant the aforementioned relief.

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APPENDIX

A1

Exhibit A

APPOINTING AUTHORITY'S APPROVAL OF CHARGES

FEB 23 2004

FOR: Legal Advisor to the Appointing Authority

SUBJECT: Approval of Charges, U.S. v. ALI HAMZA AHMAD SULAYMAN AL BAHLUL

The charge is approved. I direct trial by Military Commission to be convened at a future date.

2 Encls
1. Charge
2. Chief Prosecutor's Recommendation

THOMAS L. HEMINGWAY
Brigadier General, U.S. Air Force
Deputy Appointing Authority
Office of Military Commissions

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	**CHARGE:**
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	**CONSPIRACY**
a/k/a Ali Hamza Ahmed Suleiman al Bahlul	)	
a/k/a Abu Anas al Makki	)	
a/k/a Abu Anas al Yemeni	)	
a/k/a Mohammad Anas Abdullah Khalidi	)	

Ali Hamza Ahmad Sulayman al Bahlul (a/k/a Ali Hamza Ahmed Suleiman al Bahlul, a/k/a Abu Anas al Makki, a/k/a Abu Anas al Yemeni, a/k/a Mohammad Anas Abdullah Khalidi) is a person subject to trial by Military Commission. At all times material to the charge:

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 3, 2003 that Ali Hamza Ahmad Sulayman al Bahlul (a/k/a Ali Hamza Ahmed Suleiman al Bahlul, a/k/a Abu Anas al Makki, a/k/a Abu Anas al Yemeni a/k/a Mohammad Anas Abdullah Khalidi, hereinafter "al Bahlul") is subject to his Military Order of November 13, 2001.

2. Al Bahlul's charged conduct is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.

4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.

5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.

6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

8. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula.

9. In February of 1998, Usama bin Laden, Ayman al Zawahari and others under the banner of the "International Islamic Front for Jihad on the Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."

10. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize enemies of God."

11. Since 1989, members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

12. Ali Hamza Ahmad Sulayman Al Bahlul (a/k/a Ali Hamza Ahmed Suleiman al Bahlul, a/k/a Abu Anas al Makki, a/k/a Abu Anas al Yemeni, a/k/a Mohammad Anas Abdullah Khalidi, hereinafter "al Bahlul"), in Afghanistan, Pakistan, Yemen and other countries, from on or about February 1999 to on or about December 2001, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden, Saif al Adel, Dr. Ayman al Zawahari (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), Salem Ahmed Salem Hamdan (a/k/a Saqr al Jadawi) and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian

objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.

13. In furtherance of this enterprise and conspiracy, al Bahlul and other members or associates of al Qaida committed the following overt acts:

    a. In 1999, with knowledge of Usama bin Laden's 1996 "*Declaration of Jihad Against the Americans*" and the 1998 fatwa endorsed by bin Laden calling for the "killing of Americans and their allies, both military and civilian," al Bahlul voluntarily traveled from Yemen to Afghanistan (via Pakistan) with the intent and purpose of joining and supporting Usama bin Laden in his expressed cause.

    b. In 1999, upon arriving in Afghanistan, al Bahlul met Saif al Adel, the head of the al Qaida Security Committee.

    c. Based upon arrangements made by Saif al Adel, al Bahlul participated in military training for two months at the al Qaida-sponsored Aynak camp in Afghanistan.

    d. After completing his training at Aynak camp, al Bahlul met with and pledged *bayat* to Usama bin Laden. By pledging *bayat*, al Bahlul affirmed his willingness to perform any act requested by bin Laden and to protect bin Laden from all harm.

    e. In late 1999, after completing his training at Aynak camp, al Bahlul lived at an al Qaida-sponsored guesthouse in Qandahar and performed duties in support of al Qaida.

    f. From late 1999 through December 2001, al Bahlul was personally assigned by Usama bin Laden to work in the al Qaida media office. In this capacity, al Bahlul created several instructional and motivational recruiting video tapes on behalf of al Qaida.

    g. Usama bin Laden personally tasked al Bahlul to create a video glorifying, among other things, the attack on the USS COLE. Al Bahlul created this "USS COLE" video to recruit, motivate and "awaken the Islamic Umma to revolt against America" and inspire al Qaida members and others to continue violent attacks against property and nationals (both military and civilian) of the United States and other countries.

    h. After being placed on alert by Usama bin Laden in the weeks just before the attacks of September 11, 2001, al Bahlul assisted Usama bin Laden and other al Qaida members in mobilizing and moving from Qandahar.

i. On September 11, 2001, Usama bin Laden tasked al Bahlul to set up a satellite connection so that bin Laden and other al Qaida members could see news reports. Despite his efforts, al Bahlul was unable to obtain a satellite connection because of mountainous terrain.

j. In the weeks immediately following the attacks of September 11, 2001, Usama bin Laden tasked al Bahlul to obtain media reports concerning the September 11th attacks and to gather data concerning the economic damage caused by these attacks.

k. In 2001, al Bahlul served as a bodyguard and provided protection for Usama bin Laden. While traveling with Usama bin Laden, al Bahlul was armed and wore an explosives–laden belt so that he could provide Usama bin Laden with physical security and protection.

[redacted]

No. 040003

UNITED STATES	)	
v.	)	**Military Commission Members**
ALI HAMZA AHMAD SULAYMAN AL BAHLUL a/k/a Ali Hamza Ahmed Suleiman al Bahlul a/k/a Abu Anas al Makki a/k/a Abu Anas Yemeni a/k/a Mohammad Anas Abdullah Khalidi	)	June 28, 2004

The following officers are appointed to serve as a Military Commission for the purpose trying any and all charges referred for trial in the above-styled case. The Military Commission will meet at such times and places as directed by the Appointing Authority or the Presiding Officer. Each member of the Military Commission will serve until relieved by proper authority.

In the event of incapacity, resignation, or removal of a member who has not been designated as the Presiding Officer, the alternate member is automatically appointed as a member.

Colonel Peter E. Brownback, III, USA (Retired), Presiding Officer
Colonel [redacted] USMC, Member
Colonel [redacted] USMC, Member
Colonel [redacted] USAF, Member
Lieutenant Colonel [redacted] USAF, Member
Lieutenant Colonel [redacted] USA, Alternate Member

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

[redacted]

No. 040003

UNITED STATES v. ALI HAMZA AHMAD SULAYMAN AL BAHLUL a/k/a Ali Hamza Ahmed Suleiman al Bahlul a/k/a Abu Anas al Makki a/k/a Abu Anas Yemeni a/k/a Mohammad Anas Abdullah Khalidi	**Approval of Charge And Referral** June 28, 2004

The charge against Ali Hamza Ahmad Sulayman al Bahlul (a/k/a Ali Hamza Ahmed Suleiman al Bahlul, a/k/a Abu Anas al Makki, a/k/a Abu Anas Yemeni, a/k/a Mohammad Anas Abdullah Khalidi) is approved and referred to the Military Commission identified at Encl 1. The Presiding Officer will notify me not later than July 15, 2004, of the initial trial schedule, including dates for submission and argument of motions, and a convening date.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

Department of Defense

Military Commission Order No. 1

August 31, 2005

SUBJECT: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism

References: (a) United States Constitution, Article II, Section 2

(b) Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001) ("President's Military Order")

(c) DoD 5200.2-R, "Personnel Security Program," current edition

(d) Executive Order 12958, "Classified National Security Information" (April 17, 1995, as amended, or any successor Executive Order)

(e) Section 603 of title 10, United States Code

(f) DoD Directive 5025.1, "DoD Directives System," current edition

(g) Military Commission Order No. 1 (March 21, 2002)

1. PURPOSE

This Order implements policy, assigns responsibilities, and prescribes procedures under references (a) and (b) for trials before military commissions of individuals subject to the President's Military Order. These procedures shall be implemented and construed so as to ensure that any such individual receives a full and fair trial before a military commission, as required by the President's Military Order. Unless otherwise directed by the Secretary of Defense, and except for supplemental procedures established pursuant to the President's Military Order or this Order, the procedures prescribed herein and no others shall govern such trials. This Order supersedes reference (g).

2. ESTABLISHMENT OF MILITARY COMMISSIONS

In accordance with the President's Military Order, the Secretary of Defense or a designee ("Appointing Authority") may issue orders from time to time appointing one or more military

commissions to try individuals subject to the President's Military Order and appointing any other personnel necessary to facilitate such trials.

3. JURISDICTION

A. Over Persons

A military commission appointed under this Order ("Commission") shall have jurisdiction over only an individual or individuals ("the Accused") (1) subject to the President's Military Order and (2) alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority.

B. Over Offenses

Commissions established hereunder shall have jurisdiction over violations of the laws of war and all other offenses triable by military commission.

C. Maintaining Integrity of Commission Proceedings

The Commission may exercise jurisdiction over participants in its proceedings as necessary to preserve the integrity and order of the proceedings.

4. COMMISSION PERSONNEL

A. Members

(1) Appointment

The Appointing Authority shall appoint the Presiding Officer, other members, and the alternate member or members of each Commission. The alternate member or members shall attend all sessions of the Commission except sessions with members deliberating and voting on findings and sentence and sessions conducted by the Presiding Officer under Section 4(A)(5)(a), but the absence of an alternate member shall not preclude the Commission from conducting proceedings. Alternate members shall attend deliberations on matters other than findings or sentence, but may not participate in such deliberations or in any voting. In case of incapacity, resignation, or removal of any member, an alternate member, if available, shall take the place of that member, in the sequence designated by the Appointing Authority. Any vacancy among the members or alternate members occurring after a trial has begun may, but need not, be filled by the Appointing Authority, but the substance of all prior proceedings and evidence taken in that case shall be made known to that new member or alternate member before the trial proceeds.

(2) Number of Members

Each Commission shall consist of a Presiding Officer and at least three other members, the number being determined by the Appointing Authority. For each such Commission, the

Appointing Authority shall also appoint at the outset of proceedings one or more alternate members, the number being determined by the Appointing Authority.

(3) Qualifications

Each member and alternate member shall be a commissioned officer of the United States armed forces ("Military Officer"), including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal service, and retired personnel recalled to active duty. The Appointing Authority shall appoint members and alternate members determined to be competent to perform the duties involved. The Appointing Authority may remove members and alternate members for good cause.

(4) Presiding Officer

The Appointing Authority shall designate a Presiding Officer to preside over the proceedings of that Commission. The Presiding Officer shall be a Military Officer who is a judge advocate of any United States armed force.

(5) Duties of the Presiding Officer

(a) The Presiding Officer shall rule upon all questions of law, all challenges for cause, and all interlocutory questions arising during the proceedings. The Presiding Officer may conduct hearings (except hearings on the admissibility of evidence under Section 6(D)(1)) outside the presence of the other members for the purposes of hearing and determining motions, objections, pleas, or such other matters as will promote a fair and expeditious trial. If the Presiding Officer determines that deliberations are necessary to resolve a challenge by another member under Section 6(D)(1) to a ruling by the Presiding Officer on the admissibility of evidence, the Presiding Officer shall deliberate and vote with the other members to determine the admissibility of the evidence in question. The Presiding Officer shall not deliberate or vote with the other members on findings or sentence, nor shall the Presiding Officer be present at such deliberations or votes.

(b) The Presiding Officer shall admit or exclude evidence at trial in accordance with Section 6(D). The Presiding Officer shall have authority to close proceedings or portions of proceedings in accordance with Section 6(B)(3) and for any other reason necessary for the conduct of a full and fair trial.

(c) The Presiding Officer shall ensure that the discipline, dignity, and decorum of the proceedings are maintained, shall exercise control over the proceedings to ensure proper implementation of the President's Military Order and this Order, and shall have authority to act upon any contempt or breach of Commission rules and procedures. Any attorney authorized to appear before a Commission who is thereafter found not to satisfy the requirements for eligibility or who fails to comply with laws, rules, regulations, or other orders applicable to

the Commission proceedings or any other individual who violates such laws, rules, regulations, or orders may be disciplined as the Presiding Officer deems appropriate, including but not limited to revocation of eligibility to appear before that Commission. The Appointing Authority may further revoke that attorney's or any other person's eligibility to appear before any other Commission convened under this Order.

(d) The Presiding Officer shall ensure the expeditious conduct of the trial. In no circumstance shall accommodation of counsel be allowed to delay proceedings unreasonably.

(e) The Presiding Officer shall certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority. The Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

(f) As soon as practicable at the conclusion of each Commission session, the Presiding Officer shall transmit an authenticated copy of the proceedings to the Appointing Authority.

(6) Duties of the Other Members

The other members of the Commission shall determine the findings and sentence without the Presiding Officer, and may vote on the admission of evidence, with the Presiding Officer, in accordance with Section 6(D)(1).

B. Prosecution

(1) Office of the Chief Prosecutor

The Chief Prosecutor shall be a judge advocate of any United States armed force, shall supervise the overall prosecution efforts under the President's Military Order, and shall ensure proper management of personnel and resources.

(2) Prosecutors and Assistant Prosecutors

Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Prosecutor shall detail a Prosecutor and, as appropriate, one or more Assistant Prosecutors to prepare charges and conduct the prosecution for each case before a Commission ("Prosecution"). Prosecutors and Assistant Prosecutors shall be (a) Military Officers who are judge advocates of any United States armed force, or (b) special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States. The duties of the Prosecution are:

(a) To prepare charges for approval and referral by the Appointing Authority;

(b) To conduct the prosecution before the Commission of all cases referred for trial; and

(c) To represent the interests of the Prosecution in any review process.

C. Defense

(1) Office of the Chief Defense Counsel

The Chief Defense Counsel shall be a judge advocate of any United States armed force, shall supervise the overall defense efforts under the President's Military Order, shall ensure proper management of personnel and resources, shall preclude conflicts of interest, and shall facilitate proper representation of all Accused.

(2) Detailed Defense Counsel.

Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Defense Counsel shall detail one or more Military Officers who are judge advocates of any United States armed force to conduct the defense for each case before a Commission ("Detailed Defense Counsel"). The duties of the Detailed Defense Counsel are:

(a) To defend the Accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the Accused; and

(b) To represent the interests of the Accused in any review process as provided by this Order.

(3) Choice of Counsel

(a) The Accused may select a Military Officer who is a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that Military Officer has been determined to be available in accordance with any applicable supplementary regulations or instructions issued under Section 7(A). After such selection of a new Detailed Defense Counsel, the original Detailed Defense Counsel will be relieved of all duties with respect to that case. If requested by the Accused, however, the Chief Defense Counsel may allow the original Detailed Defense Counsel to continue to assist in representation of the Accused as another Detailed Defense Counsel.

(b) The Accused may also retain the services of a civilian attorney of the Accused's own choosing and at no expense to the United States Government ("Civilian Defense Counsel"), provided that attorney: (i) is a

United States citizen; (ii) is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (iii) has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures prescribed in reference (c); and (v) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings. Civilian attorneys may be pre-qualified as members of the pool of available attorneys if, at the time of application, they meet the relevant criteria, or they may be qualified on an *ad hoc* basis after being requested by an Accused. Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in Section 4(C)(2). The qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed Commission proceedings or that person's access to any information protected under Section 6(D)(5).

(4) Continuity of Representation

The Accused must be represented at all relevant times by Detailed Defense Counsel. Detailed Defense Counsel and Civilian Defense Counsel shall be herein referred to collectively as "Defense Counsel." The Accused and Defense Counsel shall be herein referred to collectively as "the Defense."

D. Other Personnel

Other personnel, such as court reporters, interpreters, security personnel, bailiffs, and clerks may be detailed or employed by the Appointing Authority, as necessary.

5. PROCEDURES ACCORDED THE ACCUSED

The following procedures shall apply with respect to the Accused:

A. The Prosecution shall furnish to the Accused, sufficiently in advance of trial to prepare a defense, a copy of the charges in English and, if appropriate, in another language that the Accused understands.

B. The Accused shall be presumed innocent until proven guilty.

C. A Commission member, other than the Presiding Officer, shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense.

D. At least one Detailed Defense Counsel shall be made available to the Accused sufficiently in advance of trial to prepare a defense and until any findings and sentence become final in accordance with Section 6(H)(2).

E. The Prosecution shall provide the Defense with access to evidence the Prosecution intends to introduce at trial and with access to evidence known to the Prosecution that tends to exculpate the Accused. Such access shall be consistent with Section 6(D)(5) and subject to Section 9.

F. The Accused shall not be required to testify during trial. A Commission shall draw no adverse inference from an Accused's decision not to testify. This subsection shall not preclude admission of evidence of prior statements or conduct of the Accused.

G. If the Accused so elects, the Accused may testify at trial on the Accused's own behalf and shall then be subject to cross-examination.

H. The Accused may obtain witnesses and documents for the Accused's defense, to the extent necessary and reasonably available as determined by the Presiding Officer. Such access shall be consistent with the requirements of Section 6(D)(5) and subject to Section 9. The Appointing Authority shall order that such investigative or other resources be made available to the Defense as the Appointing Authority deems necessary for a full and fair trial.

I. The Accused may have Defense Counsel present evidence at trial in the Accused's defense and cross-examine each witness presented by the Prosecution who appears before the Commission.

J. The Prosecution shall ensure that the substance of the charges, the proceedings, and any documentary evidence are provided in English and, if appropriate, in another language that the Accused understands. The Appointing Authority may appoint one or more interpreters to assist the Defense, as necessary.

K. The Accused shall be present at every stage of the trial before the Commission, to the extent consistent with Section 6(B)(3), unless the Accused engages in disruptive conduct that justifies exclusion by the Presiding Officer. Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof.

L. Except by order of the Presiding Officer for good cause shown, the Prosecution shall provide the Defense with access before sentencing proceedings to evidence the Prosecution intends to present in such proceedings. Such access shall be consistent with Section 6(D)(5) and subject to Section 9.

M. The Accused may make a statement during sentencing proceedings.

N. The Accused may have Defense Counsel submit evidence to the Commission during sentencing proceedings.

O. The Accused shall be afforded a trial open to the public (except proceedings closed by the Presiding Officer), consistent with Section 6(B).

P. The Accused shall not again be tried by any Commission for a charge once a Commission's finding on that charge becomes final in accordance with Section 6(H)(2).

6. CONDUCT OF THE TRIAL

A. Pretrial Procedures

(1) Preparation of the Charges

The Prosecution shall prepare charges for approval by the Appointing Authority, as provided in Section 4(B)(2)(a).

(2) Referral to the Commission

The Appointing Authority may approve and refer for trial any charge against an individual or individuals within the jurisdiction of a Commission in accordance with Section 3(A) and alleging an offense within the jurisdiction of a Commission in accordance with Section 3(B).

(3) Notification of the Accused

The Prosecution shall provide copies of the charges approved by the Appointing Authority to the Accused and Defense Counsel. The Prosecution also shall submit the charges approved by the Appointing Authority to the Presiding Officer of the Commission to which they were referred.

(4) Plea Agreements

The Accused, through Defense Counsel, and the Prosecution may submit for approval to the Appointing Authority a plea agreement mandating a sentence limitation or any other provision in exchange for an agreement to plead guilty, or any other consideration. Any agreement to plead guilty must include a written stipulation of fact, signed by the Accused, that confirms the guilt of the Accused and the voluntary and informed nature of the plea of guilty. If the Appointing Authority approves the plea agreement, the Presiding Officer will, after determining the voluntary and informed nature of the plea agreement, admit the plea agreement and stipulation into evidence and the Commission will be bound to adjudge findings and a sentence pursuant to that plea agreement.

(5) Issuance and Service of Process; Obtaining Evidence

The Commission shall have power to:

(a) Summon witnesses to attend trial and testify;

(b) Administer oaths or affirmations to witnesses and other persons and to question witnesses;

(c) Require the production of documents and other evidentiary material; and

(d) Designate special commissioners to take evidence.

The Presiding Officer shall exercise these powers on behalf of the Commission at the Presiding Officer's own initiative, or at the request of the Prosecution or the Defense, as necessary to ensure a full and fair trial in accordance with the President's Military Order and this Order. The Commission shall issue its process in the name of the Department of Defense over the signature of the Presiding Officer. Such process shall be served as directed by the Presiding Officer in a manner calculated to give reasonable notice to persons required to take action in accordance with that process.

B. Duties of the Commission During Trial

The Commission shall:

(1) Provide a full and fair trial.

(2) Proceed impartially and expeditiously, strictly confining the proceedings to a full and fair trial of the charges, excluding irrelevant evidence, and preventing any unnecessary interference or delay.

(3) Hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President's Military Order and this Order. Grounds for closure include the protection of information classified or classifiable under reference (d); information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests. The Presiding Officer may decide to close all or part of a proceeding on the Presiding Officer's own initiative or based upon a presentation, including an *ex parte, in camera* presentation by either the Prosecution or the Defense. A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof. Except with the prior authorization of the Presiding Officer and subject to Section 9, Defense Counsel may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof. Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate time. Proceedings should be open to the maximum extent practicable.

Photography, video, or audio broadcasting, or recording of or at Commission proceedings shall be prohibited, except photography, video, and audio recording by the Commission pursuant to the direction of the Presiding Officer as necessary for preservation of the record of trial.

(4) Hold each session at such time and place as may be directed by the Appointing Authority. Members of the Commission may meet in closed conference at any time authorized by the Presiding Officer.

C. Oaths

(1) All members of a Commission, all Prosecutors, all Defense Counsel, all court reporters, all security personnel, and all interpreters shall take an oath to perform their duties faithfully.

(2) Each witness appearing before a Commission shall be examined under oath, as provided in Section 6(D)(2)(b).

(3) An oath includes an affirmation. Any formulation that appeals to the conscience of the person to whom the oath is administered and that binds that person to speak the truth, or, in the case of one other than a witness, properly to perform certain duties, is sufficient.

D. Evidence

(1) Admissibility

Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission) the evidence would have probative value to a reasonable person.

(2) Witnesses

(a) Production of Witnesses

The Prosecution or the Defense may request that the Commission hear the testimony of any person, and such testimony shall be received if found to be admissible and not cumulative. The Presiding Officer on his own initiative, or if requested by other members of the Commission, may also summon and hear witnesses. The Presiding Officer may permit the testimony of witnesses by telephone, audiovisual means, or other means; however, the Commission shall consider the ability to test the veracity of that testimony in evaluating the weight to be given to the testimony of the witness.

(b) Testimony

Testimony of witnesses shall be given under oath or affirmation. The Commission may still hear a witness who refuses to swear an oath or make a solemn undertaking; however, the Commission shall consider the refusal to swear an oath or give an affirmation in evaluating the weight to be given to the testimony of the witness.

(c) Examination of Witnesses

A witness who testifies before the Commission is subject to both direct examination and cross examination. The Presiding Officer shall maintain order in the proceedings and shall not permit badgering of witnesses or questions that are not material to the issues before the Commission. Members of the Commission may submit written questions to the Presiding Officer for the witnesses at any time.

(d) Protection of Witnesses

The Presiding Officer shall consider the safety of witnesses and others, as well as the safeguarding of Protected Information as defined in Section 6(D)(5)(a), in determining the appropriate methods of receiving testimony and evidence. The Presiding Officer may hear any presentation by the Prosecution or the Defense, including an *ex parte, in camera* presentation, regarding the safety of potential witnesses before determining the ways in which witnesses and evidence will be protected. The Presiding Officer may authorize any methods appropriate for the protection of witnesses and evidence. Such methods may include, but are not limited to: testimony by telephone, audiovisual means, or other electronic means; closure of the proceedings; introduction of prepared declassified summaries of evidence; and the use of pseudonyms.

(3) Other Evidence

Subject to the requirements of Section 6(D)(1) concerning admissibility, the Commission may consider any other evidence including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports.

(4) Notice

The Presiding Officer may, after affording the Prosecution and the Defense an opportunity to be heard, take conclusive notice of facts that are not subject to reasonable dispute either because they are generally known or are capable of determination by resort to sources that cannot reasonably be contested. The Presiding Officer shall inform the other members of any facts conclusively noticed under this provision.

(5) Protection of Information

(a) Protective Order

The Presiding Officer may issue protective orders as necessary to carry out the President's Military Order and this Order, including to safeguard "Protected Information," which includes: (i) information classified or classifiable pursuant to reference (d); (ii) information protected by law or rule from unauthorized disclosure; (iii) information the disclosure of which may endanger the physical safety of participants in Commission proceedings, including prospective witnesses; (iv) information concerning intelligence and law enforcement sources, methods, or activities; or (v) information concerning other national security interests. As soon as practicable, counsel for either side will notify the Presiding Officer of any intent to offer evidence involving Protected Information.

(b) Limited Disclosure

The Presiding Officer, upon motion of the Prosecution or *sua sponte*, shall, as necessary to protect the interests of the United States and consistent with Section 9, direct (i) the deletion of specified items of Protected Information from documents to be made available to the Accused, Detailed Defense Counsel, or Civilian Defense Counsel; (ii) the substitution of a portion or summary of the information for such Protected Information; or (iii) the substitution of a statement of the relevant facts that the Protected Information would tend to prove. The Prosecution's motion and any materials submitted in support thereof or in response thereto shall, upon request of the Prosecution, be considered by the Presiding Officer *ex parte, in camera,* but no Protected Information shall be admitted into evidence for consideration by the Commission if not presented to Detailed Defense Counsel. The Accused and the Civilian Defense Counsel shall be provided access to Protected Information falling under Section 5(E) to the extent consistent with national security, law enforcement interests, and applicable law. If access to such Protected Information is denied and an adequate substitute for that information, such as described above, is unavailable, the Prosecution shall not introduce the Protected Information as evidence without the approval of the Chief Prosecutor; and the Presiding Officer, notwithstanding any determination of probative value under Section 6(D)(1), shall not admit the Protected Information as evidence if the admission of such evidence would result in the denial of a full and fair trial.

(c) Closure of Proceedings

The Presiding Officer may direct the closure of proceedings in accordance with Section 6(B)(3).

(d) Protected Information as Part of the Record of Trial

All exhibits admitted as evidence but containing Protected Information shall be sealed and annexed to the record of trial. Additionally, any Protected Information not admitted as evidence but reviewed *in camera* and subsequently withheld from the Defense over Defense objection shall, with the associated motions and responses and any materials submitted in support thereof, be sealed and annexed to the record of trial as additional exhibits. Such sealed material shall be made available to reviewing authorities in closed proceedings.

E. Proceedings During Trial

The proceedings at each trial will be conducted substantially as follows, unless modified by the Presiding Officer to suit the particular circumstances:

(1) Each charge will be read, or its substance communicated, in the presence of the Accused and the Commission.

(2) The Presiding Officer shall ask each Accused whether the Accused pleads "Guilty" or "Not Guilty." Should the Accused refuse to enter a plea, the Presiding Officer shall enter a plea of "Not Guilty" on the Accused's behalf. If the plea to an offense is "Guilty," the Presiding Officer shall enter a finding of Guilty on that offense after conducting sufficient inquiry to form an opinion that the plea is voluntary and informed. Any plea of Guilty that is not determined to be voluntary and informed shall be changed to a plea of Not Guilty. Plea proceedings shall then continue as to the remaining charges. If a plea of "Guilty" is made on all charges, the Commission shall proceed to sentencing proceedings; if not, the Commission shall proceed to trial as to the charges for which a "Not Guilty" plea has been entered.

(3) The Prosecution shall make its opening statement.

(4) The witnesses and other evidence for the Prosecution shall be heard or received.

(5) The Defense may make an opening statement after the Prosecution's opening statement or prior to presenting its case.

(6) The witnesses and other evidence for the Defense shall be heard or received.

(7) Thereafter, the Prosecution and the Defense may introduce evidence in rebuttal and surrebuttal.

(8) The Prosecution shall present argument to the Commission. Defense Counsel shall be permitted to present argument in response, and then the Prosecution may reply in rebuttal.

(9) After the members of the Commission, other than the Presiding Officer, deliberate and vote on findings in closed conference, the senior-ranking member who voted on findings shall announce the Commission's findings in the presence of the entire Commission, the Prosecution, the Accused, and Defense Counsel. The individual votes of the members of the Commission shall not be disclosed.

(10) In the event a finding of Guilty is entered for an offense, the Prosecution and the Defense may present information to aid the Commission in determining an appropriate sentence. The Accused may testify and shall be subject to cross examination regarding any such testimony.

(11) The Prosecution and, thereafter, the Defense shall present argument to the Commission regarding sentencing.

(12) After the members of the Commission, other than the Presiding Officer, deliberate and vote on a sentence in closed conference, the senior-ranking member who voted on a sentence shall announce the Commission's sentence in the presence of the entire Commission, the Prosecution, the Accused, and Defense Counsel. The individual votes of the members of the Commission shall not be disclosed.

F. Voting

In accordance with instructions from the Presiding Officer, the other members of the Commission shall deliberate and vote in closed conference. Such a Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense. An affirmative vote of two-thirds of the other members is required for a finding of Guilty. When appropriate, the other members of the Commission may adjust a charged offense by exceptions and substitutions of language that do not substantially change the nature of the offense or increase its seriousness, or it may vote to convict of a lesser-included offense. An affirmative vote of two-thirds of the other members is required to determine a sentence, except that a sentence of death requires a unanimous, affirmative vote of all of the other members. Votes on findings and sentences shall be taken by secret, written ballot. The Presiding Officer shall not participate in, or be present during, the deliberations or votes on findings or sentence by the other members of the Commission.

G. Sentence

Upon conviction of an Accused, in accordance with instructions from the Presiding Officer, the other members of the Commission shall impose a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty, which sentence may include death, imprisonment for life or for any lesser term, payment of a fine or restitution, or such other lawful punishment or condition of punishment as the other members of the Commission shall determine to be proper. Only a Commission that includes at least seven other members may sentence an Accused to death. A Commission may (subject to rights of third parties) order confiscation of any property of a convicted Accused, deprive that Accused of any stolen property, or order the delivery of such property to the United States for disposition.

H. Post-Trial Procedures

(1) Record of Trial

Each Commission shall make a verbatim transcript of its proceedings, apart from all Commission deliberations, and preserve all evidence admitted in the trial (including any sentencing proceedings) of each case brought before it, which shall constitute the record of trial. The court reporter shall prepare the official record of trial and submit it to the Presiding Officer for

authentication upon completion. The Presiding Officer shall transmit the authenticated record of trial to the Appointing Authority. If the Secretary of Defense is serving as the Appointing Authority, the record shall be transmitted to the Review Panel constituted under Section 6(H)(4).

(2) Finality of Findings and Sentence

A Commission finding as to a charge and any sentence of a Commission becomes final when the President or, if designated by the President, the Secretary of Defense makes a final decision thereon pursuant to Section 4(c)(8) of the President's Military Order and in accordance with Section 6(H)(6) of this Order. An authenticated finding of Not Guilty as to a charge shall not be changed to a finding of Guilty. Any sentence made final by action of the President or the Secretary of Defense shall be carried out promptly. Adjudged confinement shall begin immediately following the trial.

(3) Review by the Appointing Authority

If the Secretary of Defense is not the Appointing Authority, the Appointing Authority shall promptly perform an administrative review of the record of trial. If satisfied that the proceedings of the Commission were administratively complete, the Appointing Authority shall transmit the record of trial to the Review Panel constituted under Section 6(H)(4). If not so satisfied, the Appointing Authority shall return the case for any necessary supplementary proceedings.

(4) Review Panel

The Secretary of Defense shall designate a Review Panel consisting of three Military Officers, which may include civilians commissioned pursuant to reference (e). At least one member of each Review Panel shall have experience as a judge. The Review Panel shall review the record of trial and, in its discretion, any written submissions from the Prosecution and the Defense and shall deliberate in closed conference. The Review Panel shall disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission. Within seventy-five days after receipt of the record of trial, the Review Panel shall either (a) forward the case to the Secretary of Defense with a recommendation as to disposition, or (b) return the case to the Appointing Authority for further proceedings, provided that a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred.

(5) Review by the Secretary of Defense

The Secretary of Defense shall review the record of trial and the recommendation of the Review Panel and either return the case for further proceedings or, unless making the final decision pursuant to a Presidential designation under Section 4(c)(8) of the President's Military Order, forward it to the President with a recommendation as to disposition.

(6) Final Decision

After review by the Secretary of Defense, the record of trial and all recommendations will be forwarded to the President for review and final decision (unless the President has designated the Secretary of Defense to perform this function). If the President has so designated the Secretary of Defense, the Secretary may approve or disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed or any portion thereof. If the Secretary of Defense is authorized to render the final decision, the review of the Secretary of Defense under Section 6(H)(5) shall constitute the final decision.

7. REGULATIONS

A. Supplementary Regulations and Instructions

The Appointing Authority shall, subject to approval of the General Counsel of the Department of Defense if the Appointing Authority is not the Secretary of Defense, publish such further regulations consistent with the President's Military Order and this Order as are necessary or appropriate for the conduct of proceedings by Commissions under the President's Military Order. The General Counsel shall issue such instructions consistent with the President's Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships.

B. Construction

In the event of any inconsistency between the President's Military Order and this Order, including any supplementary regulations or instructions issued under Section 7(A), the provisions of the President's Military Order shall govern. In the event of any inconsistency between this Order and any regulations or instructions issued under Section 7(A), the provisions of this Order shall govern.

8. AUTHORITY

Nothing in this Order shall be construed to limit in any way the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons. Nothing in this Order shall affect the authority to constitute military commissions for a purpose not governed by the President's Military Order.

9. PROTECTION OF STATE SECRETS

Nothing in this Order shall be construed to authorize disclosure of state secrets to any person not authorized to receive them.

10. OTHER

This Order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or

other entities, its officers or employees, or any other person. No provision in this Order shall be construed to be a requirement of the United States Constitution. Section and subsection captions in this document are for convenience only and shall not be used in construing the requirements of this Order. Failure to meet a time period specified in this Order, or supplementary regulations or instructions issued under Section 7(A), shall not create a right to relief for the Accused or any other person. Reference (f) shall not apply to this Order or any supplementary regulations or instructions issued under Section 7(A).

11. AMENDMENT

The Secretary of Defense may amend this Order from time to time.

12. DELEGATION

The authority of the Secretary of Defense to make requests for assistance under Section 5 of the President's Military Order is delegated to the General Counsel of the Department of Defense. The Executive Secretary of the Department of Defense shall provide such assistance to the General Counsel as the General Counsel determines necessary for this purpose.

13. EFFECTIVE DATE

This Order is effective immediately.

Donald H. Rumsfeld
Secretary of Defense

[redacted]

Military Commission Case No. 04-003

UNITED STATES	)	
	)	**Military**
v.	)	**Commission**
	)	**Members**
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	
a/k/a Ali Hamza Ahmed Suleiman al Bahlul	)	Appointing Order
a/k/a Abu Anas al Makki	)	No. 05-0003
a/k/a Mohammad Anas Abdullah Khalidi	)	November 4, 2005

The June 28, 2004, order appointing military commission members in the above-styled case is amended as follows:

The following members were excused pursuant to my written decision dated October 19, 2004:

Colonel [redacted] USMC, Member
Lieutenant Colonel [redacted] USAF, Member
Lieutenant Colonel [redacted] USA, Alternate Member

On August 31, 2005, Military Commission Order No. 1 was amended to remove all members, except the Presiding Officer, from the determination of all legal questions other than the admissibility of evidence. The following members, having previously participated in proceedings concerning the determination of such questions, are hereby excused to preclude any possibility that those discussions would inappropriately affect deliberations or votes on findings and sentencing (if necessary) in this case:

Colonel [redacted] USMC, Member
Colonel [redacted] USAF, Member

The following members and alternate member are appointed for the purpose of trying any and all charges referred for trial in the above-styled case:

Colonel [redacted] USAF, Member
Colonel [redacted] USAF, Member
Colonel [redacted] USAF, Member
Colonel [redacted] USA, Member
Colonel [redacted] USMC, Member
Colonel [redacted] USMC, Member
Commander [redacted] USN, Alternate Member

[redacted]

Colonel Peter E. Brownback, III, USA, previously appointed as the Presiding Officer, remains the Presiding Officer.

Should any member be excused by the Presiding Officer, that member will be automatically replaced by the named alternate member.

My December 10, 2004, Directive, staying the proceedings in four named cases, is hereby revoked for the above-styled case.

The Military Commission will meet at such time(s) as deemed appropriate by the Presiding Officer.

Any decisions previously made by the commission as a whole, whether or not announced, are hereby vacated. The parties will be provided a fresh opportunity to file and litigate motions in whatever manner the Presiding Officer determines will best provide the accused with a full and fair trial.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

No Military Commission Orders were issued in 2008

DEPARTMENT OF DEFENSE
Office of Military Commissions
1600 Defense Pentagon
Washington, DC 20301-1600

MILITARY COMMISSION ORDER NUMBER 1 — 3 June 2009

Ali Hamza Ahmad Suliman al Bahlul, a/k/a "Abu Anas al Makki," a/k/a "Ali Hamza Ismael," a/k/a "Abu Anas al Yemeni," a/k/a "Muhammad Anis Abdulla Khalidi," (ISN 0039) of Yemen was arraigned and tried before a military commission convened at the U.S. Naval Station, Guantanamo Bay, Cuba, pursuant to Military Commission Convening Order No. 07-01, dated 1 March 2007, as amended by Military Commission Convening Order No. 07-05, dated 29 May 2007, and as amended by Military Commission Convening Order No. 08-03, dated 22 October 2008.

The accused was arraigned and tried on the following offenses and the following findings or other dispositions were reached:

Charge I: 10 U.S.C. § 950v(b)(28) Conspiracy. Plea: Not Guilty. Finding: Guilty.

Specification: From about February 1999 through about December 2001 did conspire and agree with Usama bin Laden, Saif al 'Adl, and other members and associates of al Qaeda, known and unknown, to commit one or more offenses triable by military commission, to wit: murder of protected persons; attacking civilians; attacking civilian objects; commit murder in violation of the Law of War; destruction of property in violation of the Law of War; terrorism; and providing material support for terrorism at various locations in Afghanistan and elsewhere, and did undertake several overt acts in furtherance of the conspiracy.

Plea: Not Guilty. Finding: Guilty, except the words "armed himself with an explosive belt, rifle, and grenades to protect and prevent the capture of Usama bin Laden." Of the excepted words: Not Guilty.

MCO No. 1, DoD, Office of Military Commissions, Washington, DC 20301-1600 dated 3 June 09 (continued)

Charge II: 10 U.S.C. § 950u Solicitation. Plea: Not Guilty. Finding: Guilty.

Specification: From about February 1999 through about December 2001 at various locations in Afghanistan, Pakistan, and elsewhere, did solicit several suspected al Qaeda operatives, known and unknown, to commit substantive offenses triable by military commissions, to wit: murder of protected persons; attacking civilians; attacking civilian objects; murder in violation of the Law of War; destruction of property in violation of the Law of War; terrorism; and providing material support for terrorism.

Plea: Not Guilty. Finding: Guilty.

Charge III: 10 U.S.C. § 950v(b)(25) Providing Material Support for Terrorism. Plea: Not Guilty. Finding: Guilty.

Specification: From about February 1999 through about December 2001, at various locations in Afghanistan and elsewhere, did intentionally provide material support and resources to al Qaeda, an international terrorist organization then engaged in hostilities against the United States of America, including violent attacks against United States' embassies at or near Nairobi, Kenya, and Dar es Salaam, Tanzania, on or about August 7, 1998; on the USS COLE at or near Aden, Yemen, on or about October 12, 2000; and at various locations in the United States on or about September 11, 2001; knowing that al Qaeda engaged in or engages in terrorism, and acting in support of al Qaeda's objectives.

Plea: Not Guilty. Finding: Guilty, except the words "arming himself with an explosive belt, rifle, and grenades to protect and prevent the capture of Usama bin Laden." Of the excepted words: Not Guilty.

SENTENCE

The following sentence was adjudged by the members on 3 November 2008: Confinement for Life.

MCO No. 1, DoD, Office of Military Commissions, Washington, DC 20301-1600 dated 3 June 09 (continued)

ACTION

In the case of Ali Hamza Ahmad Suliman al Bahlul, a/k/a "Abu Anas al Makki," a/k/a "Ali Hamza Ismael," a/k/a "Abu Anas al Yemeni," a/k/a "Muhammad Anis Abdulla Khalidi," ISN 0039, the sentence is approved and will be executed. The accused will be confined in such place as may be prescribed by the Commander, Joint Task Force Guantanamo Bay, Cuba, or superior authority.

BY DIRECTION OF SUSAN J. CRAWFORD, CONVENING AUTHORITY:

Donna L. Wilkins
Clerk of Court
for Military Commissions

DISTRIBUTION:
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Department of Defense
Military Commission Instruction No. 2

April 30, 2003

SUBJECT: Crimes and Elements for Trials by Military Commission

References: (a) Military Commission Order No. 1 (Mar. 21, 2002)

(b) Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001)

(c) Section 113(d) of Title 10 of the United States Code

(d) Section 140(b) of Title 10 of the United States Code

(e) Section 821 of Title 10 of the United States Code

(f) Military Commission Instruction No. 1, current edition

1. PURPOSE

This Instruction provides guidance with respect to crimes that may be tried by military commissions established pursuant to references (a) and (b) and enumerates the elements of those crimes.

2. AUTHORITY

This Instruction is issued pursuant to Section 7(A) of reference (a) and in accordance with references (b) through (e). The provisions of reference (f) are applicable to this Instruction.

3. GENERAL

A. *Background.* The following crimes and elements thereof are intended for use by military commissions established pursuant to references (a) and (b), the jurisdiction of which extends to offenses or offenders that by statute or the law of armed conflict may be tried by military commission as limited by reference (b). No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question. These crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war. They constitute violations of the law of armed conflict or offenses that, consistent with that

body of law, are triable by military commission. Because this document is declarative of existing law, it does not preclude trial for crimes that occurred prior to its effective date.

B. *Effect of Other Laws.* No conclusion regarding the applicability or persuasive authority of other bodies of law should be drawn solely from the presence, absence, or similarity of particular language in this Instruction as compared to other articulations of law.

C. *Non-Exclusivity.* This Instruction does not contain a comprehensive list of crimes triable by military commission. It is intended to be illustrative of applicable principles of the common law of war but not to provide an exclusive enumeration of the punishable acts recognized as such by that law. The absence of a particular offense from the corpus of those enumerated herein does not preclude trial for that offense.

4. APPLICABLE PRINCIPLES OF LAW

A. *General Intent.* All actions taken by the Accused that are necessary for completion of a crime must be performed with general intent. This intent is not listed as a separate element. When the mens rea required for culpability to attach involves an intent that a particular consequence occur, or some other specific intent, an intent element is included. The necessary relationship between such intent element and the conduct constituting the actus reus is not articulated for each set of elements, but is presumed; a nexus between the two is necessary.

B. *The Element of Wrongfulness and Defenses.* Conduct must be wrongful to constitute one of the offenses enumerated herein or any other offense triable by military commission. Conduct is wrongful if it is done without justification or excuse cognizable under applicable law. The element of wrongfulness (or the absence of lawful justification or excuse), which may be required under the customary law of armed conflict, is not repeated in the elements of crimes below. Conduct satisfying the elements found herein shall be inferred to be wrongful in the absence of evidence to the contrary. Similarly, this Instruction does not enunciate defenses that may apply for specific offenses, though an Accused is entitled to raise any defense available under the law of armed conflict. Defenses potentially available to an Accused under the law of armed conflict, such as self-defense, mistake of fact, and duress, may be applicable to certain offenses subject to trial by military commission. In the absence of evidence to the contrary, defenses in individual cases shall be presumed not to apply. The burden of going forward with evidence of lawful justification or excuse or any applicable defense shall be upon the Accused. With respect to the issue of combatant immunity raised by the specific enumeration of an element requiring the absence thereof, the prosecution must affirmatively prove that element regardless of whether the issue is raised by the defense. Once an applicable defense or an issue of lawful justification or lawful excuse is fairly raised by the evidence presented, except for the defense of lack of mental responsibility, the burden is on the prosecution to establish beyond a reasonable doubt that the conduct was wrongful or that the defense does not apply. With respect to the defense of lack of mental responsibility, the

Accused has the burden of proving by clear and convincing evidence that, as a result of a severe mental disease or defect, the Accused was unable to appreciate the nature and quality of the wrongfulness of the Accused's acts. As provided in Section 5(C) of reference (a), the prosecution bears the burden of establishing the Accused's guilt beyond a reasonable doubt in all cases tried by a military commission. Each element of an offense enumerated herein must be proven beyond a reasonable doubt.

C. *Statute of Limitations.* Violations of the laws of war listed herein are not subject to any statute of limitations.

5. DEFINITIONS

A. *Combatant immunity.* Under the law of armed conflict, only a lawful combatant enjoys "combatant immunity" or "belligerent privilege" for the lawful conduct of hostilities during armed conflict.

B. *Enemy.* "Enemy" includes any entity with which the United States or allied forces may be engaged in armed conflict, or which is preparing to attack the United States. It is not limited to foreign nations, or foreign military organizations or members thereof. "Enemy" specifically includes any organization of terrorists with international reach.

C. *In the context of and was associated with armed conflict.* Elements containing this language require a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus (*e.g.*, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if temporally and geographically associated with armed conflict, is not "in the context of" the armed conflict). The focus of this element is not the nature or characterization of the conflict, but the nexus to it. This element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war," or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

D. *Military Objective.* "Military objectives" are those potential targets during an armed conflict which, by their nature, location, purpose, or use, effectively contribute to the opposing force's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a military advantage to the attacker under the circumstances at the time of the attack.

E. *Object of the attack.* "Object of the attack" refers to the person, place, or thing intentionally targeted. In this regard, the term includes neither collateral damage nor incidental injury or death.

F. *Protected property.* "Protected property" refers to property specifically protected by the law of armed conflict such as buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected, provided they are not being used for military purposes or are not otherwise military objectives. Such property would include objects properly identified by one of the distinctive emblems of the Geneva Conventions but does not include all civilian property.

G. *Protected under the law of war.* The person or object in question is expressly "protected" under one or more of the Geneva Conventions of 1949 or, to the extent applicable, customary international law. The term does not refer to all who enjoy some form of protection as a consequence of compliance with international law, but those who are expressly designated as such by the applicable law of armed conflict. For example, persons who either are *hors de combat* or medical or religious personnel taking no active part in hostilities are expressly protected, but other civilians may not be.

H. *Should have known.* The facts and circumstances were such that a reasonable person in the Accused's position would have had the relevant knowledge or awareness.

6. CRIMES AND ELEMENTS

A. *Substantive Offenses—War Crimes.* The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to reflect conduct of the perpetrator. Each element need not be specifically charged.

1) Willful Killing Of Protected Persons

a. *Elements.*

(1) The accused killed one or more persons;

(2) The accused intended to kill such person or persons;

(3) Such person or persons were protected under the law of war;

(4) The accused knew or should have known of the factual circumstances that established that protected status; and

(5) The killing took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

2) Attacking Civilians

a. *Elements.*

(1) The accused engaged in an attack;

(2) The object of the attack was a civilian population as such or individual civilians not taking direct or active part in hostilities;

(3) The accused intended the civilian population as such or individual civilians not taking direct or active part in hostilities to be an object of the attack; and

(4) The attack took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

3) Attacking Civilian Objects

a. *Elements.*

(1) The accused engaged in an attack;

(2) The object of the attack was civilian property, that is, property that was not a military objective;

(3) The accused intended such property to be an object of the attack;

(4) The accused knew or should have known that such property was not a military objective; and

(5) The attack took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

4) Attacking Protected Property

a. *Elements.*

(1) The accused engaged in an attack;

(2) The object of the attack was protected property;

(3) The accused intended such property to be an object of the attack;

(4) The accused knew or should have known of the factual circumstances that established that protected status; and

(5) The attack took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

5) Pillaging

a. *Elements.*

(1) The accused appropriated or seized certain property;

(2) The accused intended to appropriate or seize such property for private or personal use;

(3) The appropriation or seizure was without the consent of the owner of the property or other person with authority to permit such appropriation or seizure; and

(4) The appropriation or seizure took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) As indicated by the use of the term "private or personal use," legitimate captures or appropriations, or seizures justified by military necessity, cannot constitute the crime of pillaging.

6) Denying Quarter

a. *Elements.*

(1) The accused declared, ordered, or otherwise indicated that there shall be no survivors or surrender accepted;

(2) The accused thereby intended to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted;

(3) It was foreseeable that circumstances would be such that a practicable and reasonable ability to accept surrender would exist;

(4) The accused was in a position of effective command or control over the subordinate forces to which the declaration or order was directed; and

(5) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Element (3) precludes this offense from being interpreted as limiting the application of lawful means or methods of warfare against enemy

combatants. For example, a remotely delivered attack cannot give rise to this offense.

7) Taking Hostages

a. *Elements.*

(1) The accused seized, detained, or otherwise held hostage one or more persons;

(2) The accused threatened to kill, injure, or continue to detain such person or persons;

(3) The accused intended to compel a State, an international organization, a natural or legal person, or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Consistent with Section 4(B) of this Instruction, this offense cannot be committed by lawfully detaining enemy combatants or other individuals as authorized by the law of armed conflict.

8) Employing Poison or Analogous Weapons

a. *Elements.*

(1) The accused employed a substance or a weapon that releases a substance as a result of its employment;

(2) The substance was such that exposure thereto causes death or serious damage to health in the ordinary course of events, through its asphyxiating, poisonous, or bacteriological properties;

(3) The accused employed the substance or weapon with the intent of utilizing such asphyxiating, poisonous, or bacteriological properties as a method of warfare;

(4) The accused knew or should have known of the nature of the substance or weapon; and

(5) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The "death or serious damage to health" required by Element (2) of this offense must be a direct result of the substance's effect or effects on the human body (e.g., asphyxiation caused by the depletion of atmospheric

oxygen secondary to a chemical or other reaction would not give rise to this offense).

(2) The clause "serious damage to health" does not include temporary incapacitation or sensory irritation.

(3) The use of the "substance or weapon" at issue must be proscribed under the law of armed conflict. It may include chemical or biological agents.

(4) The specific intent element for this offense precludes liability for mere knowledge of potential collateral consequences (e.g., mere knowledge of a secondary asphyxiating or toxic effect would be insufficient to complete the offense).

9) Using Protected Persons as Shields

a. *Elements.*

(1) The accused positioned, or took advantage of the location of, one or more civilians or persons protected under the law of war;

(2) The accused intended to use the civilian or protected nature of the person or persons to shield a military objective from attack or to shield, favor, or impede military operations; and

(3) The conduct took place in the context of and was associated with armed conflict.

10) Using Protected Property as Shields

a. *Elements.*

(1) The accused positioned, or took advantage of the location of, civilian property or property protected under the law of war;

(2) The accused intended to shield a military objective from attack or to shield, favor, or impede military operations; and

(3) The conduct took place in the context of and was associated with armed conflict.

11) Torture

a. *Elements.*

(1) The accused inflicted severe physical or mental pain or suffering upon one or more persons;

(2) The accused intended to inflict such severe physical or mental pain or suffering;

(3) Such person or persons were in the custody or under the control of the accused; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Consistent with Section 4(B) of this Instruction, this offense does not include pain or suffering arising only from, inherent in, or incidental to, lawfully imposed punishments. This offense does not include the incidental infliction of pain or suffering associated with the legitimate conduct of hostilities.

(2) Severe "mental pain or suffering" is the prolonged mental harm caused by or resulting from:

(a) the intentional infliction or threatened infliction of severe physical pain or suffering;

(b) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(c) the threat of imminent death; or

(d) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(3) "Prolonged mental harm" is a harm of some sustained duration, though not necessarily permanent in nature, such as a clinically identifiable mental disorder.

(4) Element (3) of this offense does not require a particular formal relationship between the accused and the victim. Rather, it precludes prosecution for pain or suffering consequent to a lawful military attack.

12) Causing Serious Injury

a. *Elements.*

(1) The accused caused serious injury to the body or health of one or more persons;

(2) The accused intended to inflict such serious injury;

(3) Such person or persons were in the custody or under the control of the accused; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) "Serious injury" includes fractured or dislocated bones, deep cuts, torn members of the body, and serious damage to internal organs.

13) Mutilation or Maiming

a. *Elements.*

(1) The accused subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage;

(2) The accused intended to subject such person or persons to such mutilation;

(3) The conduct caused death or seriously damaged or endangered the physical or mental health or appearance of such person or persons.

(4) The conduct was neither justified by the medical treatment of the person or persons concerned nor carried out in the interest of such person or persons;

(5) Such person or persons were in the custody or control of the accused; and

(6) The conduct took place in the context of and was associated with armed conflict.

14) Use of Treachery or Perfidy

a. *Elements.*

(1) The accused invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under the law of war;

(2) The accused intended to betray that confidence or belief;

(3) The accused killed, injured, or captured one or more persons;

(4) The accused made use of that confidence or belief in killing, injuring, or capturing such person or persons; and

(5) The conduct took place in the context of and was associated with armed conflict.

15) Improper Use of Flag of Truce

a. *Elements.*

(1) The accused used a flag of truce;

(2) The accused made such use in order to feign an intention to negotiate, surrender, or otherwise to suspend hostilities when there was no such intention on the part of the accused; and

(3) The conduct took place in the context of and was associated with armed conflict.

16) Improper Use of Protective Emblems

a. *Elements.*

(1) The accused used a protective emblem recognized by the law of armed conflict;

(2) The accused undertook such use for combatant purposes in a manner prohibited by the law of armed conflict;

(3) The accused knew or should have known of the prohibited nature of such use; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) "Combatant purposes," as used in Element (2) of this offense, means purposes directly related to hostilities and does not include medical, religious, or similar activities.

17) Degrading Treatment of a Dead Body

a. *Elements.*

(1) The accused degraded or otherwise violated the dignity of the body of a dead person;

(2) The accused intended to degrade or otherwise violate the dignity of such body;

(3) The severity of the degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Element (2) of this offense precludes prosecution for actions justified by military necessity.

18) Rape

a. *Elements.*

(1) The accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;

(2) The invasion was committed by force, threat of force or coercion, or was committed against a person incapable of giving consent; and

(3) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Element (2) of this offense recognizes that consensual conduct does not give rise to this offense.

(2) It is understood that a person may be incapable of giving consent if affected by natural, induced, or age-related incapacity.

(3) The concept of "invasion" is linked to the inherent wrongfulness requirement for all offenses. In this case, for example, a legitimate body cavity search could not give rise to this offense.

(4) The concept of "invasion" is gender neutral.

B. *Substantive Offenses—Other Offenses Triable by Military Commission.* The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to reflect conduct of the perpetrator. Each element need not be specifically charged.

1) Hijacking or Hazarding a Vessel or Aircraft

a. *Elements.*

(1) The accused seized, exercised control over, or endangered the safe navigation of a vessel or aircraft;

(2) The accused intended to so seize, exercise control over, or endanger such vessel or aircraft; and

(3) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) A seizure, exercise of control, or endangerment required by military necessity, or against a lawful military objective undertaken by military forces of a State in the exercise of their official duties, would not satisfy the wrongfulness requirement for this crime.

2) Terrorism

a. *Elements.*

(1) The accused killed or inflicted bodily harm on one or more persons or destroyed property;

(2) The accused:

(a) intended to kill or inflict bodily harm on one or more persons;

or

(b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;

(3) The killing, harm or destruction was intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion; and

(4) The killing, harm or destruction took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Element (1) of this offense includes the concept of causing death or bodily harm, even if indirectly.

(2) The requirement that the conduct be wrongful for this crime necessitates that the conduct establishing this offense not constitute an attack against a lawful military objective undertaken by military forces of a State in the exercise of their official duties.

3) Murder by an Unprivileged Belligerent

a. *Elements.*

(1) The accused killed one or more persons;

(2) The accused:

(a) intended to kill or inflict great bodily harm on such person or persons

or

(b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;

(3) The accused did not enjoy combatant immunity; and

(4) The killing took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The term "kill" includes intentionally causing death, whether directly or indirectly.

(2) Unlike the crimes of willful killing or attacking civilians, in which the victim's status is a prerequisite to criminality, for this offense the victim's status is immaterial. Even an attack on a soldier would be a crime if the attacker did not enjoy "belligerent privilege" or "combatant immunity."

4) Destruction of Property by an Unprivileged Belligerent

a. *Elements.*

(1) The accused destroyed property;

(2) The property belonged to another person, and the destruction was without that person's consent;

(3) The accused intended to destroy such property;

(4) The accused did not enjoy combatant immunity; and

(5) The destruction took place in the context of and was associated with armed conflict.

5) Aiding the Enemy

a. *Elements.*

(1) The accused aided the enemy;

(2) The accused intended to aid the enemy; and

(3) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Means of accomplishing Element (1) of this offense include, but are not limited to: providing arms, ammunition, supplies, money, other items or services to the enemy; harboring or protecting the enemy; or giving intelligence or other information to the enemy.

(2) The requirement that conduct be wrongful for this crime necessitates that the accused act without proper authority. For example, furnishing enemy combatants detained during hostilities with subsistence or quarters in accordance with applicable orders or policy is not aiding the enemy.

(3) The requirement that conduct be wrongful for this crime may necessitate that, in the case of a lawful belligerent, the accused owe allegiance or some duty to the United States of America or to an ally or coalition partner. For example, citizenship, resident alien status, or a contractual relationship in or with the United States or an ally or coalition partner is sufficient to satisfy this requirement so long as the relationship existed at a time relevant to the offense alleged.

6) Spying

a. *Elements.*

(1) The accused collected or attempted to collect certain information;

(2) The accused intended to convey such information to the enemy;

(3) The accused, in collecting or attempting to collect the information, was lurking or acting clandestinely, while acting under false pretenses; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Members of a military organization not wearing a disguise and others who carry out their missions openly are not spies, if, though they may have resorted to concealment, they have not acted under false pretenses.

(2) Related to the requirement that conduct be wrongful or without justification or excuse in this case is the fact that, consistent with the law of war, a lawful combatant who, after rejoining the armed force to which that combatant belongs, is subsequently captured, can not be punished for previous acts of espionage. His successful rejoining of his armed force constitutes a defense.

7) Perjury or False Testimony

a. *Elements.*

(1) The accused testified at a military commission, in proceedings ancillary to a military commission, or provided information in a writing executed under an oath to tell the truth or a declaration acknowledging the applicability of penalties of perjury in connection with such proceedings;

(2) Such testimony or information was material;

(3) Such testimony or information was false; and

(4) The accused knew such testimony or information to be false.

8) Obstruction of Justice Related to Military Commissions

a. *Elements.*

(1) The accused did an act;

(2) The accused intended to influence, impede, or otherwise obstruct the due administration of justice; and

(3) The accused did such act in the case of a certain person against whom the accused had reason to believe:

(a) there were or would be proceedings before a military commission

or

(b) there was an ongoing investigation of offenses triable by military commission.

C. *Other Forms of Liability and Related Offenses.* A person is criminally liable as a principal for a completed substantive offense if that person commits the offense (perpetrator), aids or abets the commission of the offense, solicits commission of the offense, or is otherwise responsible due to command responsibility. Such a person would be charged as a principal even if another individual more directly perpetrated the offense. In proving culpability, however, the below listed definitions and elements are applicable. Additionally, if a substantive offense was completed, a person may be criminally liable for the separate offense of accessory after the fact. If the substantive offense was not completed, a person may be criminally liable of the lesser-included offense of attempt or the separate offense of solicitation. Finally, regardless of whether the substantive offense was completed, a person may be criminally liable of the separate offense of conspiracy in addition to the substantive offense. Each element need not be specifically charged.

1) Aiding or Abetting

a. *Elements.*

(1) The accused committed an act that aided or abetted another person or entity in the commission of a substantive offense triable by military commission;

(2) Such other person or entity committed or attempted to commit the substantive offense; and

(3) The accused intended to or knew that the act would aid or abet such other person or entity in the commission of the substantive offense or an associated criminal purpose or enterprise.

b. *Comments.*

(1) The term "aided or abetted" in Element (1) includes: assisting, encouraging, advising, instigating, counseling, ordering, or procuring

another to commit a substantive offense; assisting, encouraging, advising, counseling, or ordering another in the commission of a substantive offense; and in any other way facilitating the commission of a substantive offense.

(2) In some circumstances, inaction may render one liable as an aider or abettor. If a person has a legal duty to prevent or thwart the commission of a substantive offense, but does not do so, that person may be considered to have aided or abetted the commission of the offense if such noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.

(3) An accused charged with aiding or abetting should be charged with the related substantive offense as a principal.

2) Solicitation

a. *Elements.*

(1) The accused solicited, ordered, induced, or advised a certain person or persons to commit one or more substantive offenses triable by military commission; and

(2) The accused intended that the offense actually be committed.

b. *Comments.*

(1) The offense is complete when a solicitation is made or advice is given with the specific wrongful intent to induce a person or persons to commit any offense triable by military commission. It is not necessary that the person or persons solicited, ordered, induced, advised, or assisted agree to or act upon the solicitation or advice. If the offense solicited is actually committed, however, the accused is liable under the law of armed conflict for the substantive offense. An accused should not be convicted of both solicitation and the substantive offense solicited if criminal liability for the substantive offense is based upon the solicitation.

(2) Solicitation may be by means other than speech or writing. Any act or conduct that reasonably may be construed as a serious request, order, inducement, advice, or offer of assistance to commit any offense triable by military commission may constitute solicitation. It is not necessary that the accused act alone in the solicitation, order, inducement, advising, or assistance. The accused may act through other persons in committing this offense

(3) An accused charged with solicitation of a completed substantive offense should be charged for the substantive offense as a principal. An accused charged with solicitation of an uncompleted offense should be charged for the separate offense of solicitation. Solicitation is not a lesser-included offense of the related substantive offense.

3) Command/Superior Responsibility – Perpetrating

a. *Elements.*

(1) The accused had command and control, or effective authority and control, over one or more subordinates;

(2) One or more of the accused's subordinates committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;

(3) The accused either knew or should have known that the subordinate or subordinates were committing, attempting to commit, conspiring to commit, soliciting, or aiding or abetting such offense or offenses; and

(4) The accused failed to take all necessary and reasonable measures within his power to prevent or repress the commission of the offense or offenses.

b. *Comments.*

(1) The phrase "effective authority and control" in Element (1) of this offense includes the concept of relative authority over the subject matter or activities associated with the perpetrator's conduct. This may be relevant to a civilian superior who should not be held responsible for the behavior of subordinates involved in activities that have no relationship to such superior's sphere of authority. Subject matter authority need not be demonstrated for command responsibility as it applies to a military commander.

(2) A commander or other military or civilian superior, not in command, charged with failing adequately to prevent or repress a substantive offense triable by military commission should be charged for the related substantive offense as a principal.

4) Command/Superior Responsibility – Misprision

a. *Elements.*

(1) The accused had command and control, or effective authority and control, over one or more subordinates;

(2) One or more of the accused's subordinates had committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;

(3) The accused knew or should have known that the subordinate or subordinates had committed, attempted to commit, conspired to commit, solicited, or aided or abetted such offense or offenses; and

(4) The accused failed to submit the matter to competent authorities for investigation or prosecution as appropriate.

b. *Comments.*

(1) The phrase, "effective authority and control" in Element (1) of this offense includes the concept of relative authority over the subject matter or activities associated with the perpetrator's conduct. This may be relevant to a civilian superior who cannot be held responsible under this offense for the behavior of subordinates involved in activities that have nothing to do with such superior's sphere of authority.

(2) A commander or superior charged with failing to take appropriate punitive or investigative action subsequent to the perpetration of a substantive offense triable by military commission should not be charged for the substantive offense as a principal. Such commander or superior should be charged for the separate offense of failing to submit the matter for investigation and/or prosecution as detailed in these elements. This offense is not a lesser-included offense of the related substantive offense.

5) Accessory After the Fact

a. *Elements.*

(1) The accused received, comforted, or assisted a certain person;

(2) Such person had committed an offense triable by military commission;

(3) The accused knew that such person had committed such offense or believed such person had committed a similar or closely related offense; and

(4) The accused intended to hinder or prevent the apprehension, trial, or punishment of such person.

b. *Comments.*

(1) Accessory after the fact should be charged separately from the related substantive offense. It is not a lesser-included offense of the related substantive offense.

6) Conspiracy

a. *Elements.*

(1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;

(2) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined in it willfully, that is, with the intent to further the unlawful purpose; and

(3) One of the conspirators or enterprise members, during the existence of the agreement or enterprise, knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

b. *Comments.*

(1) Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the agreement or enterprise need not be established. A person may be guilty of conspiracy although incapable of committing the intended offense. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. The agreement or common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words.

(2) The agreement or enterprise must, at least in part, involve the commission or intended commission of one or more substantive offenses triable by military commission. A single conspiracy may embrace multiple criminal objectives. The agreement need not include knowledge that any relevant offense is in fact "triable by military commission."

(3) The overt act must be done by one or more of the conspirators, but not necessarily the accused, and it must be done to effectuate the object of the conspiracy or in furtherance of the common criminal purpose. The accused need not have entered the agreement or criminal enterprise at the time of the overt act.

(4) The overt act need not be in itself criminal, but it must advance the purpose of the conspiracy. It is not essential that any substantive offense be committed.

(5) Each conspirator is liable for all offenses committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and such conspirator remains a party to it.

(6) A party to the conspiracy who withdraws from or abandons the agreement or enterprise before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct that is wholly inconsistent with adherence to the unlawful agreement or common criminal purpose and that shows that the party has severed all connection with the conspiracy. A conspirator who effectively withdraws from or abandons the conspiracy after the performance of an overt act by one of the conspirators remains

guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the withdrawal or abandonment. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(7) That the object of the conspiracy was impossible to effect is not a defense to this offense.

(8) Conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy, and both the conspiracy and any related offense may be charged, tried, and punished separately. Conspiracy should be charged separately from the related substantive offense. It is not a lesser-included offense of the substantive offense.

7) Attempt

a. *Elements.*

(1) The accused committed an act;

(2) The accused intended to commit one or more substantive offenses triable by military commission;

(3) The act amounted to more than mere preparation; and

(4) The act apparently tended to effect the commission of the intended offense.

b. *Comments.*

(1) To constitute an attempt there must be a specific intent to commit the offense accompanied by an act that tends to accomplish the unlawful purpose. This intent need not involve knowledge that the offense is in fact "triable by military commission."

(2) Preparation consists of devising or arranging means or measures apparently necessary for the commission of the offense. The act need not be the last act essential to the consummation of the offense. The combination of specific intent to commit an offense, plus the commission of an act apparently tending to further its accomplishment, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.

(3) A person who purposely engages in conduct that would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt.

(4) It is a defense to an attempt offense that the person voluntarily and completely abandoned the intended offense, solely because of the person's own sense that it was wrong, prior to the completion of the substantive offense. The voluntary abandonment defense is not allowed if the

abandonment results, in whole or in part, from other reasons, for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance.

(5) Attempt is a lesser-included offense of any substantive offense triable by military commission and need not be charged separately. An accused may be charged with attempt without being charged with the substantive offense.

7. EFFECTIVE DATE

This Instruction is effective immediately.

William J. Haynes II
General Counsel of the Department of Defense

FOR DISCUSSION PURPOSES ONLY
DELIBERATIVE DRAFT—
CLOSE HOLD

A BILL

To facilitate bringing ~~terrorists~~ enemy combatants to justice through full and fair trial by military commissions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

CHAPTER 1—

SECTION 101. SHORT TITLE.

This Act may be cited as the "Enemy Combatant Military Commissions Act of 2006."

SECTION 102. FINDINGS.

The Congress finds:

(1) For more than 10 years, the al Qaeda terrorist organization has waged an unlawful war of violence and terror against the United States and its allies. Al Qaeda was involved in the bombing of the World Trade Center in New York City in 1993, the bombing of the U.S. Embassies in Kenya and Tanzania in 1998, and the attack on the U.S.S. *Cole* in Yemen in 2000. On September 11, 2001, al Qaeda launched the most deadly foreign attack on U.S. soil in history. Nineteen al Qaeda operatives hijacked four commercial aircraft and piloted them into the World Trade Center Towers in New York City and the headquarters of the U.S. Department of Defense at the Pentagon, and downed United Airlines Flight 93. The attack destroyed the Towers, severely damaged the Pentagon, and resulted in the deaths of approximately 3,000 innocent people.

(2) Following the attacks on the United States on September 11, Congress recognized the existing hostilities with al Qaeda and affiliated terrorist organizations and by the Authorization for the Use of Military Force Joint Resolution (Public Law 107-40) recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States" and authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

(3) The President's authority to convene military tribunals arises from the Constitution's vesting in the President of the executive power and the power of Commander in Chief of the Armed Forces. As the Supreme Court of the United States recognized in *Madsen v. Kinsella*, 343 U.S. 341 (1952), "[s]ince our nation's earliest days, such tribunals have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. . . . They have taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth."

(4) Exercising authority vested in the President by the Constitution and laws of the United States, including the Authorization for Use of Military Force Joint Resolution, and consistent in accordance with the laws of war, the President has (A) detained enemy combatants in the course of this armed conflict; and (B) issued the Military Order of November 13, 2001 to govern the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," which authorized the Secretary of Defense to establish military commissions to try individuals subject to that Order by military commission for any offenses triable by military commission that such individuals are alleged to have committed.

(5) The Supreme Court in *Hamdan v. Rumsfeld* (2006) held that the military commissions established by the Department of Defense under the President's Military Order of November 13, 2001 were not consistent with certain aspects of U.S. domestic law. The Congress may by law, and does by enactment of this statute, eliminate any deficiency of statutory authority to facilitate bringing alien enemy combatants with whom the United States is engaged in armed conflict to justice for violations of the laws of war and other crimes triable by military commissions. The prosecution of such alien enemy combatants by military commissions established and conducted consistent with this Act fully complies with the Constitution, the laws of the United States, treaties to which the United States is a party, and the laws of war.

(6) The use of military commissions is particularly important because the conflict between the United States and international terrorist organizations, including al Qaeda, the Taliban, and associated forces generally makes other alternatives, such as the use of Federal courts or courts-martial, are impracticable. The terrorists with whom the United States is engaged in armed conflict have demonstrated a commitment to the destruction of the United States and its people, to violation of the laws of war, and to the abuse of American legal processes. In a time of ongoing armed conflict, it is neither practicable nor appropriate for alien

enemy combatants like al Qaeda terrorists to be tried like American citizens in Federal courts or courts-martial.

(7) Many procedures for courts martial would not be practicable in trying alien enemy combatants for whom this Act provides for trial by military commission. For instance, court-martial proceedings would in certain circumstances—

(A) require the Government to share classified information with the accused, even though members of al Qaeda cannot be trusted with our Nation's secrets and it would not be consistent with the national security of the United States to provide them with access to classified information;

(B) exclude the use of hearsay evidence determined to be probative and reliable, even though the hearsay statements from, for example, fellow terrorists are often the only evidence available in this conflict, given that terrorists rarely fight and declare their intentions openly but instead pursue terrorist objectives in secret conspiracies the objectives of which can often be discerned only or primarily through hearsay statements from collaborators; and

(C) specify speedy trials and technical rules for sworn and authenticated statements when, due to the exigencies of wartime, the United States cannot safely require members of the armed forces to gather evidence on the battlefield as though they were police officers nor can the United States divert members from the front lines and their duty stations to attend military commission proceedings.

(8) The exclusive judicial review for which this Act, and the Detainee Treatment Act of 2005, provides, is without precedent in the history of armed conflicts involving the United States, exceeds the scope of judicial review historically provided for by military commissions, and is channeled in a manner appropriately tailored to—

(A) the circumstances of the conflicts between the United States and international terrorist organizations; and

(B) ~~and~~ the needs to ensure fair treatment of those detained as enemy combatants, to minimize the diversion of members of the armed force ~~for~~ from other wartime duties, and to protect the national security of the United States.

(9) In early 2002, as memorialized in a memorandum dated February 7, 2002, the President determined that common Article 3 of the Geneva Conventions did not apply with respect to the United States conflict with al Qaeda because al Qaeda was not a party to those treaties and the conflict with al Qaeda was an armed conflict of an international character. That was the interpretation of the United States prior to the Supreme Court's decision in *Hamdan* on June 29, 2006. The statement by the Supreme Court in *Hamdan* that common Article 3 applied gave rise to uncertainties in the conduct of the conflict, and this Act addresses such uncertainties. In particular, this Act makes clear that the standards for treating detainees under the Detainee Treatment Act of 2005 fully satisfy any obligations of the United States regarding detainee treatment under common Article 3(1), except for those obligations arising under paragraphs (b) and (d). In addition, the Act makes clear that the Geneva Conventions are not a source of judicially enforceable individual rights, thereby reaffirming that enforcement of the legal and political obligations imposed by the Conventions is a matter between the nations that are parties to them.

SEC. ~~102~~103. DEFINITIONS.

As used in this Act:

~~(1) "alien enemy combatant" means an enemy combatant who is not a citizen of the United States;~~

~~(2)~~(1) "classified information" means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954;

~~(3)~~(2) "commission" means a military commission established pursuant to chapter 2 of this Act;

~~(4)~~(3) "enemy combatant," for the purposes of this statute, means a person engaged in hostilities against the United States or its coalition partners who has committed an act that violates the law of war and this statute. The term enemy combatant includes "lawful combatants" and "unlawful combatants." ~~a individual (other than an individual found by the President or the Secretary of Defence to be entitled to status as a prisoner of war or as a "protected person" under Article 4 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949) determined by or under the authority of the President or the Secretary of Defense, to(1)—~~

(A) "Lawful" enemy combatant include members of the regular armed forces of a State party to the conflict; militia, volunteer corps, and organized resistance movements belonging to a State party to the conflict, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the laws of war; and, members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power ~~be part of or supporting an international terrorist organization engaged in hostilities against the United States or its co-belligerents, including but not limited to al Qaeda, the Taliban, or associated forces;~~

(B) "Unlawful" enemy combatants are persons not entitled to combatant immunity, who engage in acts against the United States or its coalition partners in violation of the laws and customs of war during an armed conflict. Spies and saboteurs are traditional examples of unlawful enemy combatants. For purposes of the war on terrorism, the term Unlawful Enemy Combatant is defined to include, but is not limited to, an individual who is or was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners ~~to have committed a belligerent act in aid of such an organization so engaged; or~~

~~(C) to have directly supported hostilities in aid of such enemy armed forces.~~

(4) "Geneva Conventions" means the four international conventions signed at Geneva, 12 August 1949, including common Article 3;

(5) "Law of war" is that part of international law that regulates the conduct of armed hostilities. It is often called the law of armed conflict. The law of war encompasses all international law applicable to the conduct of hostilities that is binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party (e.g., the Geneva Conventions of 1949), and applicable customary international law as recognized by the United States.

(6) "person" includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

SEC. ~~103~~104. AUTHORIZATION FOR MILITARY COMMISSIONS.

(a) The President is authorized to establish military commissions for the trial of alien enemy combatants for violations of the laws and customs of war and other crimes triable by military commissions as provided in chapter 2 of this Act. The grant of this authority should not be understood to limit the President's constitutional authority to establish military commissions on the battlefield, in occupied territories, or in armed conflicts should circumstances so require.

~~(b)~~ Military commissions shall have the authority, under such limitations as the President or Secretary of Defense may prescribe, to adjudge any punishment not forbidden by this act, including the penalty of death, imprisonment for life or term of years, payment of fine or restitution, or any other lawful punishment, ~~impose upon any accused found guilty after a proceeding under this Act a sentence that is appropriate to the offense or offenses for which there was a finding of guilt, which sentence may include death, imprisonment for life or term of years, payment of fine or restitution, or such other lawful punishment or condition of punishment as the Commission shall determine to be proper.~~

(b)

~~(c)~~

(c) The Secretary of Defense or his designee shall be authorized to carry out a sentence of punishment decreed by a military commission pursuant to such procedures.

(d) The Secretary of Defense shall submit to the Armed Services Committees of the House of Representatives and the Senate an annual report on the conduct of trials by military commissions under this Act. Each such report shall be submitted in unclassified form, with classified annex, if necessary, and consistent with national security. The report shall be submitted not later than December 31 of each year.

(e) Pursuant to the President's authority under the Constitution and laws of the United States, including the Authorization for Use of Military Force Joint Resolution, and in accordance with the law of war, the United States has the authority to detain persons who have engaged in unlawful belligerence until the cessation of hostilities. The authority to detain enemy combatants until the cessation of hostilities is wholly independent of any pre-trial detention or sentence to confinement that may occur as a result of a military commission. An enemy combatant may always be detained, regardless of the pendency or outcome of a military commission, until the cessation of hostilities as a means to prevent their return to the fight.

CHAPTER 2—MILITARY COMMISSIONS

This chapter may be cited as the "Code of Military Commissions" and shall be codified as Chapter 47A of Title 10, United States Code.

SEC. 201. MILITARY COMMISSIONS GENERALLY.

~~(a)~~ PURPOSE.—~~This chapter codifies and establishes procedures governing the use of military commissions to try alien enemy combatants for violations of the laws of war and any other crimes triable by military commissions[n]. Although military commissions have traditionally been constituted by order of the President, the decision of the Supreme Court in *Hamdan v. Rumsfeld* makes it both necessary and appropriate to codify procedures for military commissions as set forth herein.~~

(a)

(b) RULE OF CONSTRUCTION.—The procedures for military commissions set forth in this chapter are modeled after the procedures established for courts martial in the Uniform Code of Military Justice. As provided in Chapter 1, Section 102 (7), it is not practicable to try unlawful enemy combatants pursuant to the UCMJ or the procedures contained in the Manual for Courts-martial. However, due to the similarities of the UCMJ and CMC, the precedents established under the UCMJ may form precedential value for military judges and appellate courts when interpreting the rules under the CMC, but only insomuch as the provisions of each act are the same. It is not intended that any of the rights, privileges, or procedures contained under the UCMJ, and specifically removed from the CMC, are to be applied by implication or application. ~~It would be neither desirable nor practicable to try alien enemy combatants by court martial procedures, however. Therefore, no construction or application of chapter 47 of this title shall be controlling in the construction or application of this chapter[n].~~

(c) Members of al Qaeda and affiliated organizations may be tried for war ~~crimes~~violations of the law of war and offenses triable by military commissions committed against the United States or its co-belligerents before, on, or after September 11, 2001. A person charged with an offense under this Act may be tried and punished at any time without limitations. An acquittal or conviction under this act does not preclude the United States, in accordance with the law of war, to detain enemy combatants until the cessation of hostilities as a means to prevent their return to the fight.

(d) A military commission established under this chapter is a regularly constituted court, affording all the necessary judicial guarantees for purposes of common Article 3 of the Geneva Conventions.

SEC. 202. PERSONS SUBJECT TO MILITARY COMMISSIONS.

~~Alien e~~Enemy combatants, as defined in section 102 of this Act, shall be subject to trial by military commissions as set forth in this chapter.

(adapted from UCMJ Art. 2)

SEC. 203. JURISDICTION OF MILITARY COMMISSIONS.

Military commissions shall have jurisdiction to try any offense made punishable by this chapter, or by regulations promulgated pursuant to this chapter, when committed by an alien enemy combatant.

(adapted from UCMJ Art. 17, 18)

SEC. 204. WHO MAY CONVENE MILITARY COMMISSIONS.

(a) The Secretary of Defense may issue orders appointing one or more military commissions to try individuals under this chapter.

(b) The Secretary of Defense may delegate his authority to convene military commissions or to promulgate any regulations under this chapter.

(c) The "Secretary" in this chapter shall be the "Secretary of Defense." The "convening authority" shall be the Secretary of Defense or his designee.

(adapted from UCMJ Art. 22)

SEC. 205. WHO MAY SERVE ON MILITARY COMMISSIONS. [26]

(a) Any commissioned officer of the United States Armed Forces on active duty is eligible to serve on a military commission. Eligible commissioned officers shall include, without limitation, reserve personnel on active duty, National Guard personnel on active duty in Federal service, or retired personnel recalled to active duty.

(b) When convening a commission, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a commission when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(c) Before a commission is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case.

(adapted from UCMJ Art. 25)

SEC. 206. MILITARY JUDGE OF A MILITARY COMMISSION.

(a) A military judge shall be detailed to each commission. The Secretary shall prescribe regulations providing for the manner in which military judges are detailed for such commissions and for the persons who are authorized to detail military judges for such ~~courts-martial~~commissions. The military judge shall preside over each commission to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a commission shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member in accordance with regulations prescribed under subsection (a). Unless the military commission is convened by the Secretary of Defense, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. ~~A commissioned officer who is certified to be qualified for duty as a military judge of a commission may perform such duties as are assigned to him by or with the approval of that Judge Advocate General or his designee.~~

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a commission may not consult with the members of the commission except in the presence of the accused (except as provided in section 216), trial counsel, and defense counsel, nor may he vote with the members of the commission.

(adapted from UCMJ Art. 26)

SEC. 207. DETAIL OF TRIAL COUNSEL AND DEFENSE COUNSEL

(a) Trial counsel and defense counsel shall be detailed for each commission. Assistant trial counsel and assistant and associate defense counsel may be detailed for each commission. Defense counsel shall be detailed as soon as practicable after the swearing of charges against the person accused. The Secretary of Defense shall prescribe regulations providing for the manner in which counsel are detailed for such commission and for the persons who are authorized to detail counsel for such commission.

(b) No person who has acted as investigating officer, military judge, or court commission member in any case may act later as trial counsel or, unless expressly requested by the accused, as defense counsel in the same case. No person who has acted for the prosecution may act later in the same case for the defense, nor may any person who has acted for the defense act later in the same case for the prosecution.

(c) Trial counsel or defense counsel detailed for a military commission—

(1) must be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and

(2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member; or

(3) must be otherwise qualified to practice before the commission pursuant to regulations prescribed by the Secretary of Defense.

(adapted from UCMJ Art. 27)

SEC. 208. DETAIL OR EMPLOYMENT OF REPORTERS AND INTERPRETERS.

Under such regulations as the Secretary of Defense may prescribe, the convening authority of a military commission shall detail or employ qualified court reporters, who shall record the proceedings of and testimony taken before that commission. Under like regulations the convening authority may detail or employ interpreters who shall interpret for the commission, to include interpretation for the defense. [redacted]

(adapted from UCMJ Art. 28)

SEC. 209. ABSENT AND ADDITIONAL MEMBERS.

(a) No member of a military commission may be absent or excused after the court commission has been assembled for the trial of the accused unless excused as a result of challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause.

(b) A military commission shall have at least five members. Whenever a military commission is reduced below that number, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than five members. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court commission has been read to the court commission in the presence of the military judge, the accused (except as provided by section 216), and counsel for both sides.

(adapted from UCMJ Art. 29)

SEC. 210. CHARGES AND SPECIFICATIONS.

(a) Charges and specifications shall be signed by a person subject to the Uniform Code of Military Justice under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—

(1) that the signer has personal knowledge of, or reason to believe, the matters set forth therein; and

(2) that they are true in fact to the best of his/her knowledge and belief.

(b) Upon the swearing of the charges in accordance with subsection (a), the person accused shall be informed of the charges against him as soon as practicable.

(adapted from UCMJ Art. 30)

SEC. 211. COMPULSORY SELF-INCRIMINATION PROHIBITED.

(a) No person shall be required to testify against himself at a commission proceeding.

(b) Statements obtained by use of torture, as defined in 18 U.S.C. § 2340, whether or not under color of law, shall not be admissible, except against a person accused of torture as evidence the statement was made. No otherwise admissible statement obtained through the use of [redacted] may be received in evidence if the military judge finds that the circumstances under which the statement was made render it unreliable or lacking in probative value.

(adapted from UCMJ Art. 31)

SEC. 212. SERVICE OF CHARGES.

The trial counsel to whom charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had in English and, if appropriate, in another language that the accused understands, sufficiently in advance of trial to prepare a defense.

(adapted from UCMJ Art. 35)

SEC. 213. RULES OF PROCEDURE.

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases triable in military commissions may be prescribed by the Secretary of Defense, but may not be contrary to or inconsistent with this chapter.

(b) Subject to such exceptions and limitations as the Secretary of Defense may provide by regulation, evidence in a military commission shall be admissible if the military judge determines that the evidence would have probative value to a

~~reasonable person~~ is relevant and has probative value~~]~~. Hearsay evidence shall be admissible in the discretion of the military judge unless the circumstances render it unreliable or lacking in probative value.

(c) SUBMISSION OF PROCEDURES.—Not later than 90 days after the date of enactment of this Act, the Secretary of Defense shall submit to the Armed Services Committees of the House of Representatives and the Senate a report setting forth the procedures for military commissions promulgated under this chapter. Thereafter, the Secretary of Defense shall submit to the same committees a report on any modification of such procedures, no later than 60 days before the date on which such modifications shall go into effect.

(adapted from UCMJ Art. 36)

SEC. 214. UNLAWFULLY INFLUENCING ACTION OF COMMISSION.

(a) No authority convening a military commission may censure, reprimand, or admonish the commission or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the commission, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person may attempt to coerce or, by any unauthorized means, influence the action of a commission or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to

(1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions, or

(2) to statements and instructions given in open proceedings by the military judge or counsel.

~~(b)~~ In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person may, in preparing any such report consider or evaluate the performance of duty of any such member of a commission, or give a less favorable rating or evaluation of any member or the armed forces because of the zeal with which such member, as counsel, represented any accused before a military commission. ~~as counsel in representing any accused before a military commission.~~

(b)

(adapted from UCMJ Art. 37)

SEC. 215. DUTIES OF TRIAL COUNSEL AND DEFENSE COUNSEL.

(a) TRIAL COUNSEL.—The trial counsel of a military commission shall prosecute in the name of the United States, and shall, under the direction of the ~~court~~commission, prepare the record of the proceedings.

(b) DEFENSE COUNSEL.—

(1) The accused shall be represented in his defense before a military commission as provided in this subsection[m].

(2) The accused may be represented by civilian counsel if ~~provided~~ retained by him, provided that civilian counsel: (i~~)~~) is a United States citizen; (ii) is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (iii) has not been the subject of any sanction of disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher; (v) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings; and (vi) complies with any other requirements that the Secretary of Defense may prescribe by regulation[n].

(3) The accused shall also be represented by military counsel detailed under section 207 of this chapter.

(4) If the accused is represented by civilian counsel, military counsel detailed shall act as associate counsel.

(5) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under section 207 of this chapter to detail counsel in his sole discretion may detail additional military counsel.

(adapted from UCMJ Art. 38)

SEC. 216. SESSIONS.

(a) At any time after the service of charges which have been referred for trial by military commission, the military judge may call the commission into session without the presence of the members for the purpose of—

(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

(2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the commission;

(3) if permitted by regulations of the Secretary of Defense, holding the arraignment and receiving the pleas of the accused; and

(4) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 213 of this chapter and which does not require the presence of the members of the commission.

These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel, except as provided by subsection (c), and shall be made part of the record.

(b) When the members of the commission deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the commission with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, and the trial counsel, except as provided by subsection (c).

(c) The military commission shall hold open proceedings, in the presence of the accused, except as provided in this subsection.

(1) The military judge may close all or part of a proceeding on his own initiative or based upon a presentation, including an *ex parte* or *in camera* presentation, by either the prosecution or the defense.

(2) The military judge may close to the public all or a portion of the proceeding upon a finding that closing of the proceeding is necessary to protect classified information; information the disclosure of which could reasonably be expected to cause identifiable damage to the public interest; the physical safety of the participants in the proceeding; intelligence and law enforcement sources, methods, or activities; or other national security interests.

(3) A decision to close a proceeding or portion thereof may include a decision to exclude the accused only upon a finding by the military judge that doing so is necessary to protect the national security, to ensure the safety of individuals, or to prevent disruption. One military defense counsel shall be present for all trial proceedings, and the exclusion of the accused shall be no broader than necessary.

(4) If the accused is denied access to classified evidence presented in the proceeding, a redacted or unclassified summary of evidence shall be provided, if it is possible to do so without compromising intelligence sources, methods, or activities, or other national security interests. No evidence shall be admitted to which the accused has been denied access if its admission would result in the denial of a [redacted].

(adapted from UCMJ Art. 39)

SEC. 217. CONTINUANCES.

The military judge may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.

(adapted from UCMJ Art. 40)

SEC. 218. CHALLENGES.

(a) The military judge and members of the commission may be challenged by the accused or the trial counsel for cause stated to the commission. The military judge shall determine the relevance and validity of the challenges for cause, and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those challenges presented by the defense ~~by the accused~~ are offered.

(b) Each accused and the trial counsel is entitled to one peremptory challenge, but the military judge may not be challenged except for cause.

(adapted from UCMJ Art. 41)

SEC. 219. OATHS.

(a) Before performing their respective duties, military judges, members of commissions, trial counsel, defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully. The form of the oath, the time and place of the taking thereof, the manner of recording the same, and whether the oath shall be taken for all cases in which these duties are to be performed or for a particular case, shall be as prescribed in regulations of the Secretary. These regulations may provide that an oath to perform faithfully duties as a military judge, trial counsel, or defense counsel, may be taken at any time by any judge advocate or other person certified to be qualified or competent for duty, and if such an oath is taken it need not again be taken at the time the judge advocate, or other person is detailed to that duty.

(b) Each witness before a commission shall be examined on oath.

(adapted from UCMJ Art. 42)

SEC. 220. FORMER JEOPARDY.

(a) No person may, without his consent, be tried by a commission a second time for the same offense.

(b) No proceeding in which the accused has been found guilty by military commission upon any charge or specification is a trial in the sense of this section until the finding of guilty has become final after review of the case has been fully completed.

(adapted from UCMJ Art. 44)

SEC. 221. PLEAS OF THE ACCUSED[113].

(a) If an accused after charges have been filed makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the commission shall proceed as though he had pleaded not guilty.

(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty is sought. With respect to any other charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge, a finding of guilty of the charge or specification may, if permitted by regulations, be entered immediately without a vote. This finding shall constitute the finding of the commission unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

(adapted from UCMJ Art. 45)

SEC. 222. OPPORTUNITY TO OBTAIN WITNESSES AND OTHER EVIDENCE.

(a) Defense counsel shall have opportunity to obtain witnesses and other evidence in accordance with such regulations as the Secretary of Defense may prescribe. Defense counsel may cross-examine each witness for the prosecution who testifies before the commission. Process issued in military commissions to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any place where the United States shall have jurisdiction thereof.

(b) As soon as practicable, trial counsel shall disclose to the defense the existence of any evidence known to trial counsel that reasonably tends to exculpate the accused. Exculpatory evidence that is classified may be provided solely to military defense counsel, after in camera review by the military judge. All exculpatory classified evidence shall be provided to the accused in a redacted or summary form, if it is possible to do so without compromising intelligence sources, methods, or activities, or other national security interests.

(adapted from UCMJ Art. 46)

SEC. 223. DEFENSE OF LACK OF MENTAL RESPONSIBILITY.

(a) It is an affirmative defense in a trial by military commission that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.

(b) The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

(c) Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge shall instruct the members of the commission as to the defense of lack of mental responsibility under this section and shall charge them to find the accused—

(1) guilty;

(2) not guilty; or

(3) not guilty only by reason of lack of mental responsibility.

(adapted from UCMJ Art. 50A)

SEC. 224. VOTING AND RULINGS.

(a) Voting by members of a military commission on the findings and on the sentence shall be by secret written ballot.

(b) The military judge shall rule upon all questions of law, including the admissibility of evidence, and all interlocutory questions arising during the proceedings. Any such ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused is final and constitutes the ruling of the commission. However, the military judge may change his ruling at any time during the trial.

(c) Before a vote is taken of the findings, the military judge shall, in the presence of the accused and counsel, instruct the members of the commission as to the elements of the offense and charge them—

(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted;

(3) that, if there is reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

(4) that the burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the United States.

(adapted from UCMJ Art. 51)

SEC. 225. NUMBER OF VOTES REQUIRED.

(a) CONVICTION[14].—

~~No person may be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the military commission present at the time the vote is taken.~~

~~(2)~~

(1) No person may be convicted of any ~~other~~ offense, except as provided in section 221(b) of this chapter or by concurrence of two-thirds of the members present at the time the vote is taken.

(2) Where less than two-thirds of the members present at the time the vote is taken do not concur, the accused is acquitted of the respective offense.

(b) SENTENCE.—

(1) Capital Cases. Where the President or Secretary have expressly made an offense punishable by death, ~~N~~no person may be sentenced to suffer death, unless all members present at the time the vote is taken ~~except~~

(A) unanimously concur in a finding of guilty; and

(B) unanimously concur in a sentence of death, ~~by the concurrence of all the members of the military commission present at the time the vote~~

~~is taken and for an offense in this chapter expressly made punishable by death.~~

(2) Non-Capital Cases.

(A) No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken[15].

(B) All other sentences shall be determined by the concurrence of two-thirds of the members at the time the vote is taken.

(adapted from UCMJ Art. 52)

SEC. 226. COMMISSION TO ANNOUNCE ACTION.

A military commission shall announce its findings and sentence to the parties as soon as determined.

(adapted from UCMJ Art. 53)

SEC. 227. RECORD OF TRIAL.

(a) Each military commission shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge. If the record cannot be authenticated by the military judge by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or by that of a member of the commission if the trial counsel is unable to authenticate it by reason of his death, disability, or absence. Where appropriate, and as provided by regulation, the record of the military commission may contain a classified annex.

(b) A complete record of the proceedings and testimony shall be prepared in every military commission established under this chapter.

(c) A copy of the record of the proceedings of each military commission shall be given to the accused as soon as it is authenticated. Where the record contains classified information, or a classified annex, the accused should receive a redacted version of the record. The appropriate defense counsel shall have access to the unredacted record, as provided by regulation.

(adapted from UCMJ Art. 54)

SEC. 228. CRUEL OR UNUSUAL PUNISHMENTS PROHIBITED.

Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a military commission or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

(adapted from UCMJ Art. 55)

SEC. 229. MAXIMUM LIMITS.

The punishment which a military commission may direct for an offense may not exceed such limits as the President or Secretary of Defense may prescribe for that offense.

(adapted from UCMJ Art. 56)

SEC. 230. EXECUTION OF CONFINEMENT[JAG].

Under such regulations as the Secretary of Defense may prescribe, a sentence of confinement adjudged by a military commission may be carried into execution by confinement in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use. Persons so confined in a penal or correctional institution not under the control of one of the armed forces are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District of Columbia, or place in which the institution is situated. Any sentence to confinement will have no effect upon the ability of the United States, in accordance with the law of war, to detain enemy combatants until the cessation of hostilities.

(adapted from UCMJ Art. 58)

SEC. 231. ERROR OF LAW; LESSER INCLUDED OFFENSE.

(a) A finding or sentence of a military commission may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

(b) Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense.

(adapted from UCMJ Art. 59)

SEC. 232. REVIEW BY THE CONVENING AUTHORITY.

(a) The findings and sentence of a military commission shall be reported promptly to the convening authority after the announcement of the sentence.

(b) REVIEW BY CONVENING AUTHORITY.—

(1) The accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence. Such a submission shall be made within 10 days after the accused has been given an authenticated record of trial.

(2) If the accused shows that additional time is required for the accused to submit such matters, the convening authority, for good cause, may extend the applicable period under paragraph (1) for not more than an additional 20 days.

(3) The accused may waive his right to make a submission to the convening authority under paragraph (1). Such a waiver must be made in writing and may not be revoked. For the purposes of subsection (c)(2), the time within which the accused may make a submission under this subsection shall be deemed to have expired upon the submission of such a waiver to the convening authority.

(c) ACTION BY THE CONVENING AUTHORITY.—

(1) The authority under this section to modify the findings and sentence of a military commission is a matter of command prerogative involving the sole discretion of the convening authority.

(2) Action on the sentence of a military commission shall be taken by the convening authority. Subject to regulations of the Secretary of Defense, such action may be taken only after consideration of any matters submitted by the accused under subsection (b) or after the time for submitting such matters expires, whichever is earlier. The convening authority, in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part. The convening authority may not increase the sentence beyond that which is found by the commission.

(3) Action on the findings of a military commission by the convening authority is not required. However, such person, in his sole discretion, may—

(A) dismiss any charge or specification by setting aside a finding of guilty thereto; or

(B) change a finding of guilty to a charge to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge.

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(d) ORDER OF REVISION OR REHEARING.—

(1) The convening authority, in his sole discretion, may order a proceeding in revision or a rehearing.

(2) A proceeding in revision may be ordered if there is an apparent error or omission in the record or if the record shows improper or inconsistent action by a military commission with respect to the findings or sentence that can be rectified without material prejudice to the substantial rights of the accused. In no case, however, may a proceeding in revision—

(A) reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty;

(B) reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation;

(C) increase the severity of the sentence unless the sentence prescribed for the offense is mandatory.

(3) A rehearing may be ordered by the convening authority if he disapproves the findings and sentence and states the reasons for disapproval of the findings. If such a person disapproves the findings and sentence and does not order a rehearing, he shall dismiss the charges. A rehearing as to the findings may not be ordered where there is a lack of sufficient evidence in the record to support the findings. A rehearing as to the sentence may be ordered if the convening authority disapproves the sentence.

(adapted from UCMJ Art. 60)

SEC. 233. WAIVER OR WITHDRAWAL OF APPEAL.

(a) In each case subject to appellate review under section 236 or 237 of this chapter, except a case in which the sentence as approved under section 232 of this chapter includes death, the accused may file with the convening authority a statement expressly waiving the right of the accused to such review. Such a waiver shall be signed by both the accused and by a defense counsel and must be filed within 10 days after the action under section 232 of this chapter is served on the accused or on defense counsel. The convening authority, for good cause, may extend the period for such filing by not more than 30 days.

(b) Except in a case in which the sentence as approved under section 233 of this chapter includes death, the accused may withdraw an appeal at any time.

(c) A waiver of the right to appellate review or the withdrawal of an appeal under this section bars review under section 236 or 237 of this chapter.

(adapted from UCMJ Art. 61)

SEC. 234. APPEAL BY THE UNITED STATES.

(a) In a trial by military commission, the United States may take an interlocutory appeal to the Court of Military Commission Review of any order or ruling of the military judge which terminates commission proceedings with respect to a charge or specifications or which excludes evidence that is substantial proof of a fact material in the proceeding. However, the United States may not appeal an order or ruling that is, or amounts to, a finding of not guilty by the commission with respect to the charge or specification.

(b) The United States shall take an appeal by filing a notice of appeal with the military judge within five days after the date of such order or ruling.

(c) An appeal under this section shall be forwarded by means prescribed under regulations of the Secretary of Defense directly to the Court of Military Commission Review. In ruling on an appeal under this section, the Court of Military Commission Review may act only with respect to matters of law.

(adapted from UCMJ Art. 62)

SEC. 235. REHEARINGS.

Each rehearing under this chapter shall take place before a military commission composed of members not members of the commission which first heard the case. Upon a rehearing the accused may not be tried for any offense of which he was found not guilty by the first commission, and no sentence in excess of or more than the original sentence may be imposed unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory. If the sentence approved after the first commission was in accordance with a pretrial agreement and the accused at the rehearing changes his plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with pretrial agreement, the sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first commission.

(adapted from UCMJ Art. 63)

SEC. 235. REVIEW BY COURT OF MILITARY COMMISSION REVIEW.

(a) The Secretary of Defense shall establish a Court of Military Commission Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing military commission decisions, the court may sit in panels or as a whole in accordance with rules prescribed by the Secretary.

(b) The Secretary of Defense shall assign appellate military judges to a Court of Military Commission Review, who may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or the highest court of a State.

(c) Both the accused and the United States, pursuant to section 235, may take an appeal from the final decision of a military commission to the Court of Military Commission Review in accordance with procedures prescribed under regulations of the Secretary of Defense.

(d) In ruling on an appeal under this section, the Court of Military Commission Review may act only with respect to matters of law.

(adapted from UCMJ Art. 66)

SEC. 236. REVIEW BY THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Pursuant to Section 1005(e)(3) of the Detainee Treatment Act of 2005, the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission. The Court of Appeals shall not review the final judgment until all other appeals under this chapter have been waived or exhausted. The Supreme Court of the United States may review by writ of certiorari the final judgment of the Court of Appeals pursuant to section 1257 of title 28, United States Code.

(adapted from UCMJ Art. 67)

SEC. 237. APPELLATE COUNSEL.

(a) The Secretary of Defense shall, by regulation, establish procedures for the appointment of appellate counsel for the United States and for the accused. Appellate counsel shall meet the qualifications for appearing before military commissions under this chapter.

(b) Appellate counsel may represent the United States in any appeal or review proceeding under this chapter. Appellate Government counsel may represent the United States before the Supreme Court in cases arising under this chapter when requested to do so by the Attorney General.

(c) The accused shall be represented by appellate military counsel before the Court of Military Commission Review, the United State Court of Appeals for the District of Columbia Circuit, or the Supreme Court, or by civilian counsel if provided by him, so long as the civilian counsel meets the qualifications for appearing before military commissions under this chapter.

(adapted from UCMJ Art. 70)

SEC. 239. EXECUTION OF SENTENCE; SUSPENSION OF SENTENCE.

(a) If the sentence of the commission extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit.

(b) If a sentence extends to death, the sentence may not be executed until there is a final judgment as to the legality of the proceedings (and with respect to death, approval under subsection (a)). A judgment as to legality of the proceedings is final in such cases when review is completed by the Court of Military Commission Review and—

(1) the time for the accused to file a petition for review by the Court of Appeals for the D.C. Circuit has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court; or

(2) review is completed in accordance with the judgment of the Court of Appeals for the D.C. Circuit and (i) a petition for a writ of certiorari is not timely filed; (ii) such a petition is denied by the Supreme Court; or (iii) review is otherwise completed in accordance with the judgment of the Supreme Court.

(c) The Secretary of Defense or the convening authority acting on the case under section 233 of this chapter may suspend the execution of any sentence or part thereof, except a death sentence.

(adapted from UCMJ Art. 71)

SEC. 240. FINALITY OF PROCEEDINGS, FINDINGS, AND SENTENCES.

(a) The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of military commissions as approved, reviewed, or affirmed as required by this chapter, are final and conclusive. Orders publishing the proceedings of military commissions are binding upon all departments, courts, agencies, and officers of the United States, subject only to action by the Secretary

of Defense as provided in section 240 of this chapter, and the authority of the President.

(b) Except as provided for in this chapter, and notwithstanding any other law, including section 2241 of title 28, United States Code (or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of enactment of this Act, relating to the prosecution, trial, or judgment of a military commission convened under this section, including challenges to the lawfulness of commission procedures.

(adapted from UCMJ Art. 76)

SEC. 241. SUBSTANTIVE OFFENSES.

(a) BACKGROUND.—The following provisions codify offenses that have traditionally been tried by military commissions. This Act does not purport to establish new crimes that did not exist before its establishment, but rather to codify those crimes for trial by military commission and for other purposes under federal law. Because these provisions are declarative of existing law, they do not preclude trial for crimes that occurred prior to their effective date.

(b) The Secretary of Defense may, by regulation, specify other violations of the laws of war that may be tried by military commission, provided that no such offense may be cognizable in a trial by military commission if that offense did not exist prior to the conduct in question.

(adapted from UCMJ subchapter X)

SEC. 242. PRINCIPALS.

Any person punishable under this chapter who—

(a) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission or

(b) causes an act to be done which if directly performed by him would be punishable by this chapter, is a principal.

(adapted from UCMJ Art. 77)

SEC. 243. ACCESSORY AFTER THE FACT.

Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in

order to hinder or prevent his apprehension, trial, or punishment shall be punished as a military commission may direct.

(adapted from UCMJ Art. 78)

SEC. 244. CONVICTION OF LESSER OFFENSE.

An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.

(adapted from UCMJ Art. 79)

SEC. 245. ATTEMPTS.

(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

(b) Any person subject to this chapter who attempts to commit any offense punishable by this act shall be punished as a military commission may direct.

~~(b)~~(c) Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

(adapted from UCMJ Art. 80)

SEC. 246. SOLICITATION.

Any person subject to this chapter who solicits or advises another or others to commit one or more substantive offenses triable by military commission shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a military commission may direct.

(adapted from UCMJ Art. 82)

SEC. 247. CRIMES TRIABLE BY MILITARY COMMISSION.

The following enumerated offenses, when committed in the context of and associated with armed conflict, shall be triable by military commission under this chapter.

(a) DEFINITIONS.—

(1) COMBATANT IMMUNITY.—"Combatant immunity" means the privilege accorded to lawful combatants ~~under the law of~~who are in compliance with the law of war ~~armed conflict~~.

(2) PROTECTED PERSON.—For purposes of this section, "protected person" refers to any person who is protected under one or more of the Geneva Conventions, including those placed *hors de combat* by sickness, wounds, or detention, and medical or religious personnel taking no direct or active part in hostilities.

(3) PROTECTED PROPERTY.—"Protected property" refers to property specifically protected by the law of ~~armed conflict~~war such as buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected, provide they are not being used for military purposes or are not otherwise military objectives. Such property would include objects properly identified by one of the distinctive emblems of the Geneva Conventions but does not include all civilian property.

(b) OFFENSES IN VIOLATION OF THE LAWS OF WAR.—

(1) WILLFULLY KILLING PROTECTED PERSONS.—Any person who intentionally kills one or more protected persons other than incident to a lawful attack is guilty of the offense of willfully killing protected persons and shall be subject to whatever punishment the commission may direct.

(2) ATTACKING CIVILIANS.—Any person who intentionally engages in an attack upon a civilian population as such or individual civilians not taking direct or active part in hostilities other than incident to a lawful attack is guilty of the offense of attacking civilians and shall be subject to whatever punishment the commission may direct.

(3) ATTACKING CIVILIAN OBJECTS.—Any person who intentionally engages in an attack upon civilian objects (property that is not a military objective) other than incident to a lawful attack shall be guilty of the offense of attacking civilian objects and shall be subject to whatever punishment the commission may direct.

(4) ATTACKING PROTECTED PROPERTY.—Any person who intentionally engages in an attack upon protected property other than incident to a lawful attack shall be guilty of the offense of attacking protected property and shall be subject to whatever punishment the commission may direct.

(5) PILLAGING.—Any person who intentionally and in the absence of military necessity appropriates or seizes property for private or personal use, without the consent of a person with authority to permit such

appropriation or seizure, shall be guilty of the offense of pillaging and shall be subject to whatever punishment the commission may direct.

(6) DENYING QUARTER.—Any person who, with effective command or control over subordinate forces, declares, orders, or otherwise indicates to those forces that there shall be no survivors or surrender accepted, with the intent therefore to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted, shall be guilty of denying quarter and shall be subject to whatever punishment the commission may direct.

(7) TAKING HOSTAGES.—Any person who, having seized or detained one or more persons in violation of the laws of armed conflict, threatens to kill, injure, or continue to detain such person or persons with the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons, shall be guilty of the offense of taking hostages and shall be subject to whatever punishment the commission may direct.

(8) EMPLOYING POISON OR ANALOGOUS WEAPONS.—Any person who intentionally, as a method of warfare, employs a substance or a weapon that releases a substance that causes death or serious and lasting damage to health in the ordinary course of events, through its asphyxiating, bacteriological, or toxic properties, shall be guilty of employing poison or analogous weapons and shall be subject to whatever punishment the commission may direct.

(9) USING PROTECTED PERSONS AS SHIELDS.—Any person who positions, or otherwise takes advantage of, protected persons with the intent to shield a military objective from attack or to shield, favor, or impede military operations, shall be guilty of the offense of using protected persons as a shields and shall be subject to whatever punishment the commission may direct.

(10) USING PROTECTED PROPERTY AS SHIELDS.—Any person who positions, or otherwise takes advantage of the location of, civilian property or protected property under the law of war with the intent to shield a military objective from attack or to shield, favor, or impede military operations, shall be guilty of the offense of using protected property as shields and shall be subject to whatever punishment the commission may direct.

(11) TORTURE.—Any person who commits an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control shall be guilty of torture and subject to

whatever punishment the commission may direct. "Severe mental pain or suffering" has the meaning provided in 18 U.S.C. § 2340(2).

(12) WILLFULLY CAUSING GREAT SUFFERING OR SERIOUS INJURY.—Any person who intentionally causes serious injury or serious endangerment to the body or health of one or more protected persons shall be guilty of the offense of causing serious injury and shall be subject to whatever punishment the commission may direct.

(13) MUTILATING OR MAIMING.—Any person who intentionally injures one or more protected persons, by disfiguring the person or persons by any mutilation thereof or by permanently disabling any member, limb, or organ of his body, without any legitimate medical or dental purpose, shall be guilty of the offense of mutilation or maiming and shall be subject to whatever punishment the commission may direct.

(14) USING TREACHERY OR PERFIDY.—Any person who, after inviting the confidence or belief of one or more persons that they were entitled to, or obliged to accord, protection under the law of war, intentionally makes use of that confidence or belief in killing, injuring, or capturing such person or persons, shall be guilty of using treachery or perfidy and shall be subject to whatever punishment the commission may direct.

(15) IMPROPERLY USING A FLAG OF TRUCE.—Any person who uses a flag of truce to feign an intention to negotiate, surrender, or otherwise to suspend hostilities when there is no such intention, shall be guilty of improperly using a flag of truce and shall be subject to whatever punishment the commission may direct.

(16) IMPROPERLY USING A DISTINCTIVE EMBLEM.—Any person who intentionally uses a distinctive emblem recognized by the law of armed conflict for combatant purposes in a manner prohibited by the law of armed conflict shall be guilty of improperly using a distinctive emblem and shall be subject to whatever punishment the commission may direct.

(17) WILLFULLY MISTREATING A DEAD BODY.—Any person who intentionally mistreats the body of a dead person, without justification by legitimate military necessary, shall be guilty of the offense of mistreating a dead body and shall be subject to whatever punishment the commission may direct.

(18) RAPE.—Any person who forcibly or with coercion or threat of force invades the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused or with any foreign object shall be guilty of the offense of rape and shall be subject to whatever punishment the commission may direct.

(19) CONSPIRACY.—Any person who conspires to commit one or more substantive offenses triable under this section, and who knowingly does any overt act to effect the object of the conspiracy, shall be guilty of conspiracy to commit a war crime and shall be subject to whatever punishment the commission may direct[117].

(c) OTHER OFFENSES TRIABLE BY MILITARY COMMISSION.—

(1) HIJACKING OR HAZARDING A VESSEL OR AIRCRAFT.—Any person ~~not protected by combatant immunity~~ who intentionally seizes, exercises unauthorized control over, or endangers the safe navigation of, a vessel or aircraft that was not a legitimate military target is guilty of the offense of hijacking or hazarding a vessel or aircraft and shall be subject to whatever punishment the commission may direct.

(2) TERRORISM.—Any person ~~not protected by combatant immunity~~ who intentionally kills or inflicts great bodily harm on one or more persons in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, shall be guilty of the offense of terrorism and shall be subject to whatever punishment the commission may direct.

(3) MURDER BY AN UNPRIVILEGED BELLIGERENT.—Any person ~~not protected by combatant immunity~~ who intentionally kills one or more persons, or intentionally engages in an act that evinced a wanton disregard for human life, shall be guilty of the offense of murder by an unprivileged belligerent and shall be subject to whatever punishment the commission may direct.

(4) DESTRUCTION OF PROPERTY BY AN UNPRIVILEGED BELLIGERENT.—Any person ~~not protected by combatant immunity~~ who intentionally destroys property belonging to another person, without that person's consent, shall be guilty of the offense of destruction of property by an unprivileged belligerent and shall be subject to whatever punishment the commission may direct.

(5) WRONGFULLY AIDING THE ENEMY.—Any person who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States or one its co-belligerents shall be guilty of the offense of wrongfully aiding the enemy and shall be subject to whatever punishment the commission may direct.

(6) SPYING.—Any person who collects or attempts to collect certain information, intending to convey such information to an enemy of the United States or one of its co-belligerents, by clandestine means or while

acting under false pretenses, shall be guilty of the offense of spying and shall be subject to whatever punishment the commission may direct.

SEC. 248. PERJURY AND OBSTRUCTION OF JUSTICE.

The military commissions also may try offenses and impose punishments for perjury, false testimony, or obstruction of justice related to military commissions.

(adapted from UCMJ Art. 84)

THE WHITE HOUSE

WASHINGTON

February 7, 2002

MEMORANDUM FOR: THE VICE PRESIDENT
THE SECRETARY OF STATE
THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL
CHIEF OF STAFF TO THE PRESIDENT
DIRECTOR OF CENTRAL INTELLIGENCE
ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Humane Treatment of Taliban and al Qaeda Detainees

1. Our recent extensive discussions regarding the status of al Qaeda and Taliban detainees confirm that the application of Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, (Geneva) to the conflict with al Qaeda and the Taliban involves complex legal questions. By its terms, Geneva applies to conflicts involving "High Contracting Parties," which can only be states. Moreover, it assumes the existence of "regular" armed forces fighting on behalf of states. However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our nation recognizes that this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.

2. Pursuant to my authority as commander in chief and chief executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the attorney general in his letter of February 1, 2002, I hereby determine as follows:

   a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.

   b. I accept the legal conclusion of the attorney general and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to exercise that authority at this time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise the authority in this or future conflicts.

   c. I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al

Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."

d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.

3. Of course, our values as a nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

4. The United States will hold states, organizations, and individuals who gain control of United States personnel responsible for treating such personnel humanely and consistent with applicable law.

5. I hereby reaffirm the order previously issued by the secretary of defense to the United States Armed Forces requiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

6. I hereby direct the secretary of state to communicate my determinations in an appropriate manner to our allies, and other countries and international organizations cooperating in the war against terrorism of global reach.

/s/ George W. Bush

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SECTION: PRESS CONFERENCE OR SPEECH

LENGTH: 22028 words

HEADLINE: HEARING OF THE SENATE ARMED SERVICES COMMITTEE

SUBJECT: THE FUTURE OF MILITARY COMMISSIONS

CHAIRED BY: SENATOR JOHN WARNER (R-VA)

WITNESSES: ATTORNEY GENERAL ALBERTO GONZALES; DEPUTY DEFENSE SECRETARY GORDON ENGLAND

LOCATION: 216 HART SENATE OFFICE BUILDING. WASHINGTON, D.C.

BODY:

SEN. WARNER: Good afternoon, ladies and gentlemen. We apologize for starting a little after 2:00, but we had a vote. That's the one thing that we have to do here.

So the committee meets today to conduct the third in a series of hearings on the future of military commissions in light of the Supreme Court's decision in Hamdan v. Rumsfeld. We are privileged to have with us the attorney general of the United States, the Honorable Alberto Gonzales, and the deputy secretary of Defense, the Honorable Gordon England. They are accompanied respectively by Mr. Bradbury, acting head of the Justice Department legal office counsel, and Mr. Dell'Orto, deputy general counsel of the Department of Defense.

In two previous hearings, we've had the benefit of the testimony of the judge advocate general of the armed forces, retired judge advocates general, human rights groups and bar associations and academics who specialize in military law.

Today, we hear from the administration on its recommendations for legislation to create new military commissions consistent with -- I'm sorry -- new military commissions consistent with the issues raised by the Supreme Court in the Hamdan decision, both statutory and with respect to Common Article 3 of the Geneva Convention.

We've been in regular consultation, I want to say, Attorney General Gonzales and Secretary England. We've had excellent consultation here in the Senate with your respective departments right along. We understand that the final draft of the administration proposal is still being worked upon, and that's for the good, in my judgment. This is a very important thing.

Nevertheless, it's clear that it would be beneficial for the committee, given that we're about to go on recess, to receive their current status report on this particular piece of legislation. Our committee intends to work with the administration during the August recess with the strong possibility of additional hearings by the committee before we mark-up a bill and report it to the Senate leadership -- bipartisan leadership of the Senate.

I reiterate what I've said before: Congress must get this right. We must produce legislation that provides for an effective means of trying those alleged to have violated the law of war, while at the same time complying with our obligations under international and domestic law. How we treat people in these circumstances will affect the credibility of our country in the eyes of the world.

Thank you.

Senator Levin. Senator Levin, I understand that you have another matter; and therefore, you will combine your opening remarks with a question or two. Am I correct on that?

SEN. CARL LEVIN (D-MI): Well, I'd be happy to do that, but I probably -- we should get the statements first from our witnesses, and then if you would allow me to ask questions first I would appreciate it.

SEN. WARNER: I would be happy to do that.

SEN. LEVIN: Thank you, Mr. Chairman.

And first, let me thank our attorney general and Deputy Secretary England very much for being here.

The Supreme Court's decision in the Hamdan case struck down the military commission procedures established by the administration, because they did not meet the standards of the Uniform Code of Military Justice or those of the Geneva Conventions. Congress has now begun the process of determining what needs to be done to ensure that our system for trying detainees for crimes meets the standards established by the Supreme Court as the law of the land.

We started this process where it should begin, with the military lawyers who are most familiar with the rules for courts martial and the history and practice of military commissions. These officers also understand the practical importance of our adherence to American values and the rule of law in the treatment of others. If we torture of mistreat persons whom we detain on the battlefield or if we proceed to try detainees without fair procedures, we increase the risk that our own troops will be subject to similar abuses at the hands of others.

Today we continue our review by hearing the views of senior administration officials. Last week, a copy of an early draft of an administration proposal was leaked to the press and has been widely circulated. This draft has now been posted on The Washington Post website. We understand that this draft is still evolving, so I will base my questions on the earlier leaked version of the document. I don't know what else to do. It's either that or on the evolving version which apparently we've had some briefing on, but I think it's wiser to base questions on what we know was a draft rather than to speculate.

So the draft and the process through which it was developed will provide some insight into the administration's approach to this issue.

First, the administration seems to have used the UCMJ as a starting point for its draft. While there are extensive departures from the UCMJ, without any demonstration of practical necessity in my judgment, I do welcome the administration's apparent acknowledgment that the UCMJ is in fact the appropriate starting point for military commission legislation.

As the Supreme Court held in the Hamdan case, the regular military courts in our system are the courts martial established by congressional statutes and a military commission can be regularly constituted by the standards of our military justice system only if some practical need explains deviation from the court martial practice.

Second, the Hamdan court also ruled that, quote, "the rules set forth in the manuals for court martial must apply to military commissions unless impracticable," to use their word. Unfortunately, the administration draft takes just three sentences to dismiss both the manual for courts martial and the military rules of evidence. The draft authorizes the secretary of Defense to prescribe procedures, including modes of proof for trials by commissions. It then provides that, quote, "evidence in a military commission shall be admissible if the military judge determines that the evidence is relevant and is a probative value," close quote. And, quote, "hearsay evidence shall be admissible in the discretion of the military judge unless the circumstances render it unreliable or lacking in probative value," close quote. That is virtually unchanged from the evidentiary standard that the Supreme Court rejected in the Hamdan case.

There are undoubtedly parts of the manual for courts martial and the military rules of evidence that would be impractical to apply to military commissions for the criminal trial of detainees. In accordance with the Supreme Court's ruling, however, these areas should be identified by exception rather than by a wholesale departure from all procedures and all rules of evidence applicable in courts martial.

Mr. Chairman, our committee, I believe, should now ask our military lawyers to systematically review the manual for courts martial and the military rules of evidence and make recommendations as to the areas in which deviations are needed on the basis of the Supreme Court's test of impracticability. We already have a Joint Service Committee on Military Justice, which is responsible for reviewing proposed changes to the UCMJ and the manual for courts martial.

And it would be well suited to this new task should our chairman make that decision to assign that task or request them to undertake it.

Third, we've been told that the administration's working draft has now been provided to the judge advocates general of the military services and that some of their comments have already been incorporated into the draft. This is a considerable improvement over the manner in which the administration adopted its previous order on commissions when, we have been told, none of the recommendations of the judge advocates general were adopted. But it still puts the cart before the horse. Rather than asking the judge advocates general to comment on a draft that was prepared by a limited circle of political appointees, the administration should have allowed the experts -- the military lawyers -- to prepare the initial drafts of the proposal.

Mr. Chairman, regardless of whether the administration will listen to the concerns of the judge advocates general in this issues, we should. So far, this committee has addressed this issue in a systematic, deliberative manner. I commend our chairman for doing so, and I know we're going to continue to do so.

I hope that as soon as we receive a formal proposal from the administration that we will reconvene the panel from our first hearing so that those distinguished military officers will have a full opportunity to provide us their views on the administration proposal and their own recommendations as to how we should proceed on this issue.

Finally, the draft on The Washington Post website contains some of the same objectionable language regarding coerced testimony as the original military order. The draft language states, quote, "no otherwise admissible statement obtained through the use of" -- and then there's a word that's blacked out -- "may be received in evidence if the military judge finds that the circumstances under which the statement was made render it unreliable or lacking in probative value." Given the administration's long-standing position on this issue, it seems likely that -- and I'll ask the attorney general about this -- that the word that had been blacked out is coercion, and that this provision is intended to expressly permit the use of coerced testimony under the circumstances identified in that draft.

If so, the provision leaves the door open for the introduction of testimony obtained through the use of techniques such as water boarding, intimidating use of military dogs and so forth. Techniques which our top military lawyers said are inconsistent with the standards of the Army field manual and Common Article 3 of the Geneva Conventions.

The use of evidence obtained through such techniques in a criminal trial would be inconsistent with the Supreme Court's ruling in the Hamdan case, inconsistent with the requirements of the Geneva Conventions, inconsistent with our values as Americans and not of the best interest of U.S. servicemen and women who may one day be captured in combat. If the administration insists on including this provision in its draft legislation, I hope that we will reject that language.

Mr. Chairman, we need to develop a workable framework for the trial of detainees by military commissions consistent with the ruling of the Supreme Court in Hamdan, and that is what we are about. And as you say, Mr. Chairman, it is important that we develop a workable framework for the trial of detainees by military commission. It's important that we be consistent with the ruling of the Supreme Court. And it's important that we do it right. This will be a very difficult endeavor, requiring us to address a series of controversial issues such as the use of classified information, the use of hearsay evidence, the applicability of manual for courts martial and the military rules of evidence and the definition of substantive offenses tryable by military commissions.

I hope we will not open up other issues, as important as they are, because this task is difficult enough. The proper treatment of detainees, the role of combatant status review tribunals, and habeas corpus rights of detainees, that are a very difficult issue and that were debated in the context of last year's Detainee Treatment Act, need to be addressed but not, it seems to me, if we're going to make progress on this critical issue that is before us. And so, I hope that we'll avoid that pitfall by keeping our legislative focus on the issues that we must address, which is to establish a workable framework for military commissions.

Thank you, again, Mr. Chairman, for your position that you've taken in this matter, that we're going to do this thing thoroughly and properly and thoughtfully. I think it's the right way to do.

SEN. WARNER: Well, I want to say that I can't account for all of the websites and various things that are popping up. But the purpose of this hearing is to receive the work in progress and the current status of the thinking of the administration from the two most qualified people, the attorney general and the deputy secretary, to give us the facts.

I don't want to start prejudging this situation based on what might be in websites and other things.

Senator McCain, you've taken the lead on this from the very beginning. Do you have a few opening comments you'd like make?

SEN. JOHN MCCAIN (R-AZ): No, Mr. Chairman.

I'd like to repeat what I said at the beginning of this odyssey that we're on, and that is that we have to look at the best way we can protect America as our first and foremost priority.

I believe we also should comply as much as possible with the United States Supreme Court decision so that we won't have a situation evolve where we pass legislation that the Supreme Court then bounces back to us. It's not good for the process, it's not good for America.

And third of all, I don't think we can ignore in our discussions, in our deliberations, the damage that has been done to the image of the United States of America because of allegations, either true or false, about our treatment of prisoners. And if we are in a long struggle, part of that struggle is a psychological one, and we must remain the nation that is above and different from those of our enemies -- than our enemies. And I think that's important to keep that in mind as we address this issue in its specifics.

But the other fact is that we're in a struggle that engages us in every way, and without the moral superiority that this nation has enjoyed for a couple a hundred years, we could do great damage to our effort in winning this struggle that we're engaged in.

I thank you, Mr. Chairman.

SEN. WARNER: Thank you very much, Senator.

Senator Lindsey Graham, you likewise have taken a lead on this. Do you have any comments for the opening?

SEN. LINDSEY GRAHAM (R-SC): No, sir.

SEN. WARNER: Any other colleagues seeking recognition?

Yes, Mr. Dayton.

SEN. MARK DAYTON (D-MN): Mr. Chairman, I just wanted to salute Senator McCain for his comments. I think they're perfectly said.

SEN. WARNER: I thank the senator.

General, delighted to have you here today and fully recognize that this is an interim report on your part. And as Senator Levin suggested, we will certainly have additional hearings, at which time you will be given the opportunity to come before us.

ATTY GEN. GONZALES: Thank you, Mr. Chairman, Senator Levin and members of the committee.

I am pleased to appear today on behalf of the administration to discuss the elements of the legislation that we believe Congress should put in place to respond to the Supreme Court's decision in Hamdan versus Rumsfeld.

Let me say a word about process first. As this committee knows, the administration has been working hard on a legislative proposal that reflects extensive interagency deliberations as well as numerous consultations with members of Congress. Our deliberations have included detailed discussion with members of the JAG corps, and I personally met twice with the judge advocates general. They have provided multiple rounds of comments, and those comments will be reflected in the legislative package that we plan to offer for Congress' consideration.

Mr. Chairman, first and foremost, the administration believes that Congress should respond to Hamdan by providing statutory authorization for military commissions to try captured terrorists for violations of the laws of war. Fundamentally, any legislation needs to preserve flexibility in the procedures for military commissions while ensuring that detainees receive a full and fair trial.

We believe that Congress should enact a new code of military commissions modeled on the court-martial procedures of the Uniform Code of Military Justice that would follow immediately after the UCMJ as a new chapter in Title 10 of the U.S. Code. The UCMJ should constitute the starting point for the new code.

At the same time, the military commission procedures should be separate from those used to try our own service members, both because military necessity would not permit the strict application of all court-martial procedures and

because there are relative differences between the procedures appropriate for trying our service members and those appropriate for trying the terrorists who seek to destroy us. Still, in most respects, the new code of military commissions can and should track closely the UCMJ.

We would propose that Congress establish a system of military commissions presided over by military judges with commission members drawn from the armed forces. The prosecution and defense counsel would be appointed from the JAG corps, and the accused may retain a civilian counsel in addition to military defense counsel. Trial procedures, sentencing and appellate review would largely track those currently provided under the UCMJ.

Because of the specific concerns raised by the Supreme Court in Hamdan and elsewhere, the new code of military commissions should depart in significant respects from the existing military commission procedures. In particular, we propose that the military judge would preside separate and apart from the other commission members, and make final rulings at trial on law and evidence, just as in courts-martial or civilian trials. We would increase the minimum number of commission members to five and require 12 members for prosecutions seeking the death penalty.

And while military commissions will track the UCMJ in many ways, commission procedures should depart from the UCMJ in those instances where the UCMJ provisions would be inappropriate or impractical for use in the trial of unlawful terrorist combatants. The UCMJ provides Miranda-type protections for U.S. military personnel that are broader than the civilian rule and that could impede or limit evidence obtained during the interrogation of terrorist detainees. I have not heard anyone contend that terrorists should be given the Miranda warnings required by the UCMJ.

The military commission procedures also should not include the UCMJ's Article 32 investigations, which is a pre-charging proceeding that is akin to but considerably more protective than a civilian grand jury. Such a proceeding is unnecessary before the trial of captured terrorists who are already subject to detention under the laws of war.

Because military commissions must try commission -- must try crimes based on evidence collected everywhere from the battlefields in Afghanistan to foreign terrorist safehouses, the commission should permit the introduction of all probative and reliable evidence, including hearsay evidence. It is imperative that hearsay evidence be considered because many witnesses are likely to be foreign nationals who are not amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury or death.

The UCMJ rules of evidence also provide for circumstances where classified evidence must be shared with the accused. I believe there is broad agreement that in the midst of the current conflict, we must not share with captured terrorists the highly sensitive intelligence that may be relevant to military commission proceedings.

A more difficult question is posed, however, as to what is to be done when that classified evidence constitutes an essential part of the prosecution's case. In the court-martial context, our rules force the prosecution to choose between disclosing the evidence to the accused or allowing the guilty to evade prosecution. It is my understanding that other countries, such as Australia, have established procedures that allow for the court, under tightly defined circumstances, to consider evidence outside the presence of the accused. The administration must -- and Congress must give careful thought as to how the balance should be struck for the use of classified information in the prosecution of terrorists before military commissions.

Mr. Chairman, the administration also believes that Congress needs to address the Supreme Court's ruling in Hamdan that Common Article 3 of the Geneva Conventions applies to our armed conflict with al Qaeda. The United States has never before applied Common Article 3 in the context of an armed conflict with international terrorists. Yet, because of the court's decision in Hamdan, we are now faced with the task of determining the best way to do just that.

Although many of the provisions of Common Article 3 prohibit actions that are universally condemned, some of its terms are inherently vague, as this committee already discussed in its recent hearing on the subject. Common Article 3 prohibits "outrages upon personal dignity," a phrase of uncertain and unpredictable application. If left undefined, this provision will create an unacceptable degree of uncertainty for those who fight to defend us from terrorist attack, particularly because any violation of Common Article 3 constitutes a federal crime under the War Crimes Act.

Furthermore, because the Supreme Court has said that courts must give respectful consideration and considerable weight to the interpretations of treaties by international tribunals and other state parties, the meaning of Common Article 3 -- the baseline standard that now applies to the conduct of U.S. personnel in the war on terror -- would be informed by the evolving interpretations of tribunals and governments outside the United States.

We believe that the standards governing the treatment of detainees by United States personnel in the war on terror should be certain. And those standards should be defined clearly by U.S. law, consistent with our international obligations. One straightforward step that Congress can take to achieve that result is to define our obligations under Common Article 3 by reference to the U.S. constitutional standard already adopted by Congress.

Last year, after a significant public debate, Congress adopted the McCain amendment as part of the DTA. That amendment prohibits cruel, inhumane or degrading treatment or punishment as defined by reference to the established meaning of our Constitution. Congress rightly assumed that the enactment of the DTA settled questions about the baseline standard that would govern the treatment of detainees.

The administration believes that we owe it to those called upon to handle detainees in the war on terror to ensure that any legislation addressing the Common Article 3 issue will bring clarity and certainty the War Crimes Act. And the surest way to achieve this, in our view, is for Congress to set forth a definite and clear list of offenses serious enough to be considered war crimes, punishable as violations of Common Article 3 under 18 USC 2441.

The difficult issues raised by the court's pronouncement on Common Article 3 are ones that the political branches need to consider carefully as they chart way forward after Hamdan.

I look forward to discussing these subjects with the committee this afternoon.

SEN. WARNER: Thank you very much, General. It seems to me to be a statement that is a good way to start this hearing. You've laid it out, I think, with some clarity here now.

ATTY GEN. GONZALES: Thank you, Mr. Chairman.

SEN. WARNER: Secretary England.

MR. ENGLAND: Chairman Warner, Senator Levin, members of the committee, first of all, thanks for the opportunity to be here. This is indeed a crucial subject.

This is also a critical time for America. We are in a real and a daily war against terrorist adversaries who are determined to destroy our way of life and that of our friends and allies. The terrorists are relentless, they oppose the very notion of freedom and liberty, and they are committed to using every possible means to achieve their end.

America did not choose this fight and we don't have the option of walking away. As a nation, we must be clear in our thoughts, candid in our words, and rock solid in our resolve.

The security challenges this nation faces in the wake of 9/11 are both complex and, in some respects, fundamentally new. The Supreme Court's Hamdan decision provides an opportunity for the executive and legislative branches to work together to solidify a legal framework for the war we are in and for future wars.

The legal framework we construct together should take the law of war, not domestic, civilian criminal standards of law and order, as its starting point.

I propose the following seven criteria against which any proposed legislation should be measured.

First, all measures adopted should reflect American values and standards.

Second, persons detained by the armed forces should always be treated humanely, without exception.

Third, our men and women in uniform must have the ability to continue to fight and win wars, including this war on terror. The nation must maintain the ability to detain and interrogate suspected terrorists, to continue to detain dangerous combatants until the cessation of hostilities, and to gather and protect critical intelligence.

Fourth, war criminals need to be prosecuted, and in a full and fair trial.

Fifth, our soldiers, sailors, airmen, Marines and Coast Guardsmen need adequate legal protections, as do the civilians who support them.

Sixth, the rules must be clear and transparent to everyone.

And lastly, we should be mindful of the impact of our legislation on the perceptions of the international community.

I do thank this committee for taking time to thoughtfully consider this very important set of issues. And I do thank you for your strong, unwavering support for the brave men and women serving every day at home and abroad to protect and defend this truly great nation.

SEN. WARNER: Thank you, Mr. Secretary. I think your statement's very helpful and we are off to a good start.

And I'd put my first question to you, Secretary England. And that's the Army Field Manual. It seems to me that that has some relevance to those of us, both administration and the Congress, that are working towards drawing up this statute, and it would be in the interest of all parties to have that before we finalize such proposals as we write into law.

MR. ENGLAND: Mr. Chairman, we do have an Army Field Manual today. It's the version of the Army Field Manual, I think, that goes all the way back to 1992.

SEN. WARNER: I'm familiar with that, yes.

MR. ENGLAND: And we were in the process of, frankly, updating that. We are very close, I believe have been very close to a resolution, but each time, it seems that something else comes up we need to consider; in this case, of course, the Hamdan decision. So we are very close to finalizing the manual. I would expect we would now finalize it when this law is complete and on the books.

SEN. WARNER: You would want the law to be adopted by the Congress before you promulgate the revised edition? Is that your thought?

MR. ENGLAND: Well, that's at least my initial thought, Senator. I guess I have to consider it, but sitting here, it would seem logical to me based on where we are today to complete this discussion of Common Article 3 and to make sure we're all in agreement in terms of how we go ahead. That said, I will tell you we're very close to the Field Manual. But at this point, that would be my initial reaction. I'd be happy to get back with you and discuss it further, but at least initially, that would seem logical to me, sir.

SEN. WARNER: I think it does require further discussion and consideration because I anticipate that at some point in time -- and let's work back from the fact that we're out of here on the 30th of September. And it's the desire of this committee, and we're supported by the bipartisan leadership of the Senate, to get this bill enacted by the Senate and hopefully over to the House such that it can become law.

MR. ENGLAND: I don't --

SEN. WARNER: Men and women of the armed forces need this.

Now, I will just take this under advisement. I'll accept your statement as it is now, and we'll discuss it further. I just wondered what view you might have on that, attorney general, the desirability of waiting till we're finished on this prior to finalizing the revision of the field manual.

ATTY GEN. GONZALES: Sir, I'm not privy to the process in terms of either -- the finalization of the Army field manual. I can only imagine, however, that those -- that those involved in that process have likewise been involved in the process of its legislation. And we have received, are continuing to receive input about what these procedures for the military commission should look like. And I have received and am continuing to receive input with respect to our obligations under Common Article 3. And so, I don't know whether or not we need to have one completed before the other, quite frankly. I think -- you know, I will obviously defer to this committee in terms of what you need, but -- but I'm not sure that they're necessary intertwining in terms of moving forward.

SEN. WARNER: Well, let's all deliberate on this.

Did you wish to have something further to say, Secretary England?

MR. ENGLAND: No, Mr. Chairman, except I didn't understand the relationship between the field manual and this pending legislation. So -- and I guess I still don't understand that relationship. We are working on the field manual. We have been working on the field manual --

SEN. WARNER: I understand that.

MR. ENGLAND: And that was really an independent action from this legislation. So I'm not quite sure how they're connected. I mean, if they are related, then we will definitely work those in some coherent manner.

SEN. WARNER: I think there is a relationship, and we'll discuss this further.

MR. ENGLAND: Okay. We'll be -- we'll be happy to do that, Mr. Chairman.

SEN. WARNER: Let's turn to the question of the classified information. The present military commission rules allow the appointed authority or the presiding officer of the commission to exclude the accused and the civilian counsel from access to evidence during proceedings that these officials decide to close to protect classified information or for other named reason. In your opinion, can a process that passes constitutional and statutory muster -- and that's the bottom line; we got to pass that. If we do not, we still have a federal court set aside this law once we put it into action.

So I repeat, in your opinion, can a process that passes constitutional and statutory muster be constructed without giving the accused and counsel possessing the necessary clearances access to such material in some form?

ATTY GEN. GONZALES: Of course. Mr. Chairman, we're not proposing that classified information be denied to cleared counsel. And I think it would be an extraordinary case when -- where classified information would be used and would not be provided to the accused. Based upon conversations that have occurred between you individually, and I understand based upon a hearing that occurred in the Senate Judiciary Committee, I think it's fairly obvious that this is one of the -- the remaining points of discussion, major points of discussion within the administration is to how to resolve this issue. I think we all agree that we cannot provide terrorists access to classified information. And so, how do we go about moving forward with the prosecution? Because, sure, we have the option to continue to hold them indefinitely for the duration of the hostilities, but we may choose -- we want to -- we may choose to bring someone to justice.

And the classified information may be crucial to that prosecution.

So there are various things that are being discussed with the administration. We could have, for example, the military judge make a finding that moving forward without providing the classified information to the accused is absolutely warranted. We could have a finding that the military -- the military judge could make a finding that, you know -- that substitutes or summaries are inadequate. We could require the military judge to make a finding that moving forward without having the accused present is warranted, given the circumstances.

So there are various things, I think, that we can do, certain procedures that have to be followed, so that we make this an extraordinary case.

But Mr. Chairman, it cannot be the case that in making a decision to move forward with a prosecution, that we have to provide classified information to a terrorist.

And so this is an issue that we're wrestling with. There's no question about that.

SEN. WARNER: Right.

ATTY GEN. GONZALES: And I think that this is something we will value the committee input --

SEN. WARNER: We haven't reached a final decision on how we're going to handle it. But I've pointed out, I think, the importance of having this statute be able to survive any subsequent federal court review process.

ATTY GEN. GONZALES: If I can make two final points again --

SEN. WARNER: Sure.

ATTY GEN. GONZALES: -- the -- his -- the counsel would be -- would have access -- the cleared counsel would have that access to the information. And there could be a mechanism, again, where we could provide either redacted summaries or something as a substitute to the accused that would not jeopardize the national security of our country.

SEN. WARNER: On the subject of hearsay evidence, given the difficulties of locating and obtaining witnesses in cases of this sort, do you believe that it would be reasonable to admit hearsay if it were not coerced and, in the opinion of a military judge or other judicial officer, there were sufficient guarantees for its veracity? In your opinion, would the admission of such evidence raise constitutional questions?

ATTY GEN. GONZALES: In my judgment, it would be permissible. The admissions of hearsay evidence has been used in other international tribunals, in Yugoslavia and Rwanda.

This is a different kind of conflict. It's an ongoing kind of conflict, where the witness or the evidence -- oftentimes it's hard to verify or hard to have firsthand access to. The witness may be out of the country, and therefore we can't serve process. The witness -- for security reasons, we may want them -- to bring them into Guantanamo. The witness may be dead. The witness may be on the front line. And do we want to be bringing our soldiers off the front line?

And so I think the -- that there are very good reasons, practical reasons, necessary reasons to deviate from the Uniform Court (sic) of Military Justice with respect to the use of hearsay.

It's vitally important, however, that the information be probative and that it be reliable.

And these decisions will be made by military judges who have been trained, and I think we all have great confidence in their wisdom and judgment. And -- but I think that the use of hearsay is absolutely important in these kind of proceedings.

SEN. WARNER: Thank you very much.

Senator Levin.

SEN. LEVIN: Thank you, Mr. Chairman.

The Supreme Court in Hamdan held that Common Article 3 of the Geneva Conventions applies to the conflict with al Qaeda. Secretary England, on July 7th, you issued a memorandum acknowledging this holding and said that the Supreme Court has determined that Common Article 3 applies, as a matter of law, to the conflict with al Qaeda.

The court found that the military commissions, as constituted by the Department of Defense, are not consistent with Article 3. And then, you went on to say the following, that all DOD personnel adhere to these standards.

Do you stand by that memorandum?

MR. ENGLAND: Yes, sir, I do.

SEN. LEVIN: And Attorney General Gonzales, do you agree with that memorandum?

ATTY GEN. GONZALES: Sir, I can't admit to having read the entire thing, but I agree with what you've read, yes, sir.

SEN. LEVIN: And would you agree in light of the Supreme Court's ruling that legislation authorizing the use of the commissions and procedures for such commissions must be consistent with the requirements of Common Article 3?

ATTY GEN. GONZALES: Yes, sir, I would.

SEN. LEVIN: Mr. Attorney General, do you believe that the use of testimony which is obtained through techniques, such as waterboarding, stress positions, intimidating use of military dogs, sleep deprivation, sensory deprivation, forced nudity -- that techniques such as I just described would be consistent -- do you believe they would be consistent with Common Article 3?

ATTY GEN. GONZALES: Well, sir, I think most importantly I can't imagine that such testimony would be reliable, and therefore, I find it unlikely that any military judge would allow such testimony in his evidence.

SEN. LEVIN: And that would be because you -- it's hard for you contemplate or conceive of such testimony being consistent with Common Article 3?

ATTY GEN. GONZALES: Sir, it would certainly be -- it -- in my judgment, it would -- there would be serious questions regarding the reliability of such testimony and therefore should not be admitted and would not be admitted under the procedures that we're currently discussing.

SEN. LEVIN: Secretary England, if such procedures were used against our own soldiers, testimony that was obtained through the use of those kind of techniques, would you accept such judgment if it were rendered against one of our troops?

MR. ENGLAND: Again, I would concur with the attorney general. I mean, hopefully that would not be permissible in a court, Senator Levin. So hopefully, it would not be used against them.

SEN. LEVIN: The -- in terms of the rule of evidence, Mr. Attorney General, Justice Kennedy assessed that it be feasible to apply most, if not all, of the conventional military evidence rules and procedures. Would you agree that most at least of the conventional military evidence rules and procedures are feasible for use in these commissions?

ATTY GEN. GONZALES: Certainly, sir, I think that -- well, first of all, let me -- let me make one observation. I think there was a difference of opinion about how to read some of these opinions. I think what the court was saying is that if the president wants to deviate, wants to use procedures inconsistent, that are not uniform with the Uniform Code

of Military Justice, then he has to have practical reasons for doing so. The UCMJ is a creature of Congress. If Congress wants to change a procedure, I think Congress has the ability under the Constitution to do that.

And I'm sorry, Senator, I forgot your question, and I apologize.

SEN. LEVIN: Do you believe it would be feasible, the way Justice Kennedy uses the word "practicability," for most, if not all -- let's say most -- of the conventional military evidence rules and procedures to be followed in commissions?

ATTY GEN. GONZALES: Again, Senator, without going through an itemized list of the procedures or rules that you're referring to, the objective that we would hope to achieve is the ability to get into evidence information that may be, quite frankly, not admissible in the Uniform Code of Military Justice, not admissible in our criminal courts, because we are fighting a new kind of war and we are talking about information that may be much more difficult to obtain. And so again, that would be our objective. And obviously, we're willing to sit down, be happy to sit down with you to talk about specific procedures.

SEN. LEVIN: We were told by, I think, one of our colleagues a week ago or so that there's a list of items in the rules of evidence which are not practical to be followed. Is there such a list that's already been created? Do either of you know?

ATTY GEN. G0NZALES: I'm not aware -- I'm not aware of such a list, Senator. I do know that obviously we've looked very hard at the Uniform Code of Military Justice and to look to see what makes sense, what continues to make sense in fighting -- in bringing to justice al Qaeda, and what things should change in order to successfully prosecute --

SEN. LEVIN: But is there a list of items?

ATTY GEN. GONZALES: Sir, I'm not aware of a specific list that you're referring to.

SEN. LEVIN: All right. Well, I'm not -- I think it was referred to here by one of our colleagues.

Secretary England, are you familiar with --

MR. ENGLAND: No, sir, I'm not.

SEN. LEVIN: If you could check it out? If there is such a list, could you --

ATTY GEN. GONZALES: Sir, there may be a list.

SEN. LEVIN: -- share it with us? Would you share it with us?

ATTY GEN. GONZALES: I'll be happy to see what we can do, sir.

SEN. LEVIN: Attorney General Gonzales, in your prepared statement you say that military commissions must permit the introduction of a broader range of evidence, including hearsay statements, because many witnesses are likely to be foreign nationals who are not amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury or death. Would you agree that legislation should allow or require the presence of a witness, if that witness is available, instead of using hearsay?

ATTY GEN. GONZALES: Sir, it depends on what you mean, "if the witness is available."

SEN. LEVIN: Well, you gave examples of where, you know, witnesses may not be available. You talk about incarceration. Say incarcerations in our jail. Should that person be presented?

ATTY GEN. GONZALES: I think that would be an instance where I think it would be more difficult, certainly, to argue this person is not available. I'm talking about someone who is in a foreign country and we cannot reach.

SEN. LEVIN: So you would prefer the presence of a witness to hearsay.

ATTY GEN. GONZALES: Absolutely, sir. But again, if it means we take one of our soldiers off the front lines, I question whether or not that's the right approach that this Congress should be considering.

SEN. LEVIN: My time is up. Thank you very much, both of you.

SEN. WARNER: Senator Inhofe?

SEN. JAMES INHOFE (R-OK): Thank you, Mr. Chairman. And as I've said before, I respect the judgment of you as chairman and the majority members of this committee to hold these hearings, although my feeling is it's premature and we should not even be having this hearing today. Senator Levin in his opening remarks referred to information that we're working on as work in progress or leaked information. I would prefer to have something in front of me that conforms to the successes that we've had in the commissions and tweaked to take care of the problem with the United States Supreme Court.

So I really don't have any questions for you. I just would like to have you keep in mind as you continue with this -- as one member of this committee who doesn't believe we should be doing this and yet I realize we have to come up with something -- that you keep in mind that my wishes would be we want to make sure that the president is able to effectively and successfully execute this next generation international war. I want to equip and protect our military as it carries out the war. I want to enact legislation that is designed to help us win. I want terrorists destroyed and locked up for good. Senator (Cornyn ?) brought up something on the courts of the world in a previous hearing. I agree with that. He said that I don't trust our national interests in security in some of the hands of -- in the hands of some of these national courts.

I'm interested in terms of the attorney-client privileges that -- I want to make sure that we have everything in place here in Congress to make sure that the attorney-client privileges are not given to the detainees, at least not to the extent that they be to American citizens.

As far as the right to trial of terrorists, I know the UCMJ Article 10 requires immediate steps to be taken to charge and try detainees, and if not, release them. On the other hand, we know that the 3rd Geneva Convention allows countries to hold POWs until the end of the conflict, and it doesn't require a trial. I kind of agree to something that Senator Clinton said during the last hearing. She said, you know, hey, we can just hold them, we don't have to try them.

The right to classified information, I just feel that -- still have to be convinced that the terrorists will truly be prevented from seeing or hearing classified information. I think you made that pretty clear in your opening remarks, both of you. And so I -- but I concur in that. So.

I guess in summary, I just think that if we would take what I think has been working well up to now, put that down, figure out a way to offset the objections that came in the Supreme Court ruling and get on with this thing.

Thank you, Mr. Chairman.

SEN. WARNER: Senator Dayton.

SEN. MARK DAYTON (D-MN): Thank you, Mr. Chairman.

Mr. Attorney General, in your written statement, page 7, you say, quote, "It is fair to say that the United States military has never before been in a conflict in which it applied Common Article 3 as the governing detention standard" --

ATTY GEN. GONZALES: Against international terrorists.

SEN. DAYTON: Well, that's not what your statement says, sir.

ATTY GEN. GONZALES: That's my statement, sir.

SEN. DAYTON: All right. And so now the Supreme Court's ruling, you concur, extends that requirement?

ATTY GEN. GONZALES: Sir, I believe -- I believe the Supreme Court has told us that Common Article 3 does apply to United States' conflict with al Qaeda. And now we need -- now the Congress and the president need to decide what does that mean for the United States moving forward.

I happen to believe, as I indicated in my opening remarks, that there is a degree of uncertainty because some of the language in Common Article 3. I personally feel that we have an obligation for those folks who are fighting for America to try to eliminate that uncertainty as much as we can. And one way to do that is to define what our obligations are under Common Article 3 by tying it to a U.S. constitutional standard, which was recognized by Congress in connection with the McCain Amendment and the Detainee Treatment Act. And so I -- that is the proposal of the administration.

SEN. DAYTON: Mr. Secretary, your directive that you issued on July 7th of this year -- I'm summarizing here, but it confirms DOD's obligation to comply with Common Article 3, it makes it clear that Department of Defense policies, directives, executive orders and doctrine already comply with the standards of Common Article 3. When the judge ad-

vocate generals of the armed forces were asked about this directive at one of our hearings on July 13th, Admiral McPherson stated, quote, "It created no new requirements for us.

We have been training to and operating under that standard for a long, long time." General Romig stated, "We train to it; we always have." Is that an accurate reflection of both your directive and your understanding of prior training and procedures?

MR. ENGLAND: Senator, yes, it is. The fact is in my July 7th letter I had commented that it was my understanding that aside from the military commission procedures, that all the orders, policies, directives are already in compliance with Common Article 3. And I then ask everyone throughout the Department of Defense to look at their own procedures, policies, et cetera that they were implementing and to provide and enter back to the department to reaffirm that they were, indeed, in compliance with Common Article 3. At this point, we've had responses from, oh, perhaps three-quarters of all the entities within the department. And they have all complied in the affirmative, and I expect that the rest of the department will also apply (sic) in the affirmative, but we have not heard back from everybody at this time, Senator.

SEN. DAYTON: Okay. Well, I'm --

ATTY GEN. GONZALES: Senator, may I add something, if you don't mind?

SEN. DAYTON: Yes, sir.

ATTY GEN. GONZALES: It's my understanding -- and obviously the deputy secretary would know much better than I, but reading the transcript when the JAGs were up before this committee, I think they all said we train to Geneva. They didn't say that they trained to Common Article 3. They said they train to the standards of Geneva, which are higher than Common Article 3. And I believe that at least one of the JAGs responded when asked are there any manuals or booklets or anything relating to Common Article 3, the answer was no, because they don't train to Common Article 3. I think they train to something higher. And so, when you ask them, well, what is -- what are your obligations, what is the standard under Common Article 3, I don't think they can give you an answer.

SEN. DAYTON: Sir, if they train to a higher standard, then all the better, it seems to me. And I'm, you know, glad to clarify that, also clarify your written statement here because, I mean, I just was very surprised that you would say that we've never before been in a conflict and we should have applied United States military Common Article 3 as the governing detention standard, including conflicts against irregular forces such as the Viet Cong and those in Somalia and other places. So I think that's an important clarification. I thank you for that.

ATTY GEN. GONZALES: Thanks for the opportunity.

SEN. DAYTON: Thank you. May I ask you also, Mr. Attorney General, in your --

SEN. WARNER: Let me interrupt.

Have you had sufficient opportunity to correct what you feel is an omission in that statement?

ATTY GEN. GONZALES: I have. Thank you. Thank you, Mr. Chairman.

SEN. WARNER: Fine. Thank you.

SEN. DAYTON: Mr. Attorney General, in your -- in your testimony you stated, if I'm quoting you correctly, that we -- you don't want to allow the accused to escape prosecution. And I would certainly concur with that statement. We were also told -- and I'm not an attorney. So forgive me here. But the Judge Advocate Generals told us that even if somebody for any reason cannot be prosecuted, they can be detained indefinitely until the cessation of hostilities. That's explicitly provided for in the Geneva Convention, and that's, you know, standard practice elsewhere.

So, I just wanted to clarify, because I think not yourselves there, but others around this subject have created a false impression that if these individuals can't be prosecuted, then they're going to be released back to their countries or into the general population. Is that -- ?

ATTY GEN. GONZALES: That is an -- that is an excellent point, Senator. This was -- this was another -- again, another issue that was raised when the JAGs were last here. I think Senator Graham is the one that actually pointed it out in connection with an exchange with Senator Clinton. Clearly, we can detain enemy combatants for the duration of the hostilities. And if we choose to try them, that's great.

If we don't choose to try them, we can continue to hold them.

SEN. DAYTON: Well, you're correct. I should have properly credited my colleague, Senator Clinton, for pointing that out, and it brings up the old adage that, you know, if you take it from one person, it's plagiarism, from many people, it's research. So I -- I'm glad you clarified that.

There was an article in last Friday's Washington Post that talks -- it leads off, "An obscure law approved by Republican-controlled Congress a decade ago has made the Bush administration nervous that officials and troops involved in handling detainee matters might be accused of committing war crimes and prosecuted at some point in U.S. courts. Senior officials have responded by drafting legislation that would grant U.S. personnel involved in the terrorism fight new protections against prosecution for past violations of the War Crimes Act of 1996. That law criminalizes violations of the Geneva Conventions governing conduct in war."

Is that part of your formal proposal to the Congress in this matter, or is that going to be made part of this proposal?

ATTY GEN. GONZALES: It will be made part of the proposal. And I think here we have agreement with the JAGs, and that is, that there should be certainty. If you're talking about prosecution for war crimes, there should be certainty, and the legislation should include a specific list of offenses so everyone knows what kinds of actions would in fact result in prosecution under the War Crimes Act.

SEN. DAYTON: Would. But you're -- as I understand this, if this article's correct, you're talking about a retroactive immunity provided for prior possible violations committed --

ATTY GEN. GONZALES: Senator, that is certainly something that is being considered. Again -- and that's not inconsistent with what is already in the Detainee Treatment Act when it talks about providing a good faith defense for those who've relied upon orders or opinions. And it seems to us that it is appropriate for Congress to consider whether or not to provide additional protections for those who've relied in good faith upon decisions made by their superiors, and that's something, obviously, that I think the Congress should consider.

SEN. DAYTON: My time's expired.

Thank you, Mr. Chairman.

SEN. WARNER: Thank you very much.

Senator McCain.

SEN. JOHN MCCAIN (R-AR): Thank you, Mr. Chairman. I want to thank the witnesses for being here, and I want to thank them for literally thousands of hours of work that's been done by them and their staffs in trying to fix the problems that exist and comply with the Supreme Court decision. And I appreciate very much their efforts.

Secretary England, it was eight months ago that we passed the law requiring for interrogation techniques to be included in the Army Field Manual. It's time we got that done, Mr. Secretary. I know we have come close on several occasions. It's not right to not comply with the law for eight months, which specifically says that interrogation techniques have got to be included in the Army Field Manual. And second of all, it's a disservice to the men and women in the field who are trying to do the job. I mean, they should have specific instructions, and it was the judgment of Congress and signed by the president that we should do that.

Now, I hope that I can -- and we have been working with you, and I hope that you will be able to accomplish this sooner, rather than later. Can we anticipate that?

MR. ENGLAND: Yes, you can, Senator. I mean, in the meantime, we have gone back to the prior field manual, so, I mean, we are definitely in compliance today with that field manual. But we did want to expand. I mean, you're absolutely right. We do need to do that, and we will work to bring that to a conclusion. And we'll work with you, sir.

SEN. MCCAIN: Thank you. I hope we can do that as soon as possible. Eight months, I think, is a sufficient period of time.

Mr. Attorney General, I have -- respectfully disagree with your testimony where you say we don't train specifically and separately to Common Article 3, and the United States has never before applied Common Article 3. I was present at that hearing, and the question that was asked of the JAGs -- and I'd like to point out again, for the record, the reason why we rely on the JAGs is because they're the military individuals, in uniform, who have been practicing the UCMJ and these laws, and they're the -- will be the ones that are going to be required to carry out whatever legislation we pass.

So we obviously -- and we admit they're not all perfect. We have Senator Graham on this committee to prove that. (Laughter.)

But the fact is, we do rely on them to a great degree.

And Mr. Attorney General, the JAGs were asked about Common Article 3, and I quote Admiral McPherson. He said, "It created no new requirements for us." He said, "We have been training to and operating under that standard for a long, long time." And General Romig said, "We train to it. We always have. I'm just glad to see that we're taking credit for what we do now." And I have had conversations where they say they are training to Common Article 3.

So I hope you will engage them in some dialogue, so we can clear up your statement here.

Please respond, sir.

ATTY GEN. GONZALES: Sir, I may be mistaken, but whether or not you're -- I am mistaken about the previous testimony, I do know that they believe -- at least --

SEN. MCCAIN: Okay.

ATTY GEN. GONZALES: -- at least from them telling me -- is they believe we need clarification about what our obligations are under Common Article 3. They may be training to Common Article 3, but they believe -- they -- that it would be wise to have additional clarification about what that means.

SEN. MCCAIN: Okay. I don't want to parse with you, but here's the -- here's a quote from the hearing.

"General Black, do you believe that Deputy Secretary England did the right thing, in light of the Supreme Court decision, in issuing a directive -- DOD to adhere to Common Article 3? And in so doing, does that impair our ability to wage the war on terror?"

General Black -- "I do agree with reinforcing the message that Common Article 3 is the baseline standard. And I would say that at least in the United States Army, and I'm confident in the other services, we've been training to that standard and living to that standard since the beginning of our Army and will continue to do so."

Admiral McPherson created no new requirements for us. As General Black has said, we've been trained to an operating -- well, pretty specific about it. And I've had conversations with him. So we may have a difference of opinion, but I'm sure we can get through it.

ATTY GEN. GONZALES: I think what's important, again, is I think there is -- perhaps I'm mistaken, and I will admit to that. But, again, the important point, I believe, is that, nonetheless, they believe we need clarification as to what Common Article 3 requires.

SEN. MCCAIN: Thank you. A draft of the proposal that we've been all referring to -- it's on various web sites, et cetera -- indicates that statements obtained by the use of torture, as defined in Title 18, would not be admissible in a military commission trial of an accused terrorist.

Mr. Attorney General, do you believe that statements obtained through illegal, inhumane treatment should be admissible?

ATTY GEN. GONZALES: Senator -- well, again, I'll say this. The concern that I would have about such a prohibition is what does it mean? How do you define it? And so I think if we could all reach agreement about the definition of cruel and inhumane and degrading treatment, then perhaps I could give you an answer.

I could foresee a situation where, depending on the situation, I would say no, it should not be admitted. But depending on your definition of something that's degrading, such as insults or something like that, I would say that information should still come in.

SEN. MCCAIN: Well, I think that if you practice illegal, inhumane treatment and allow that to be admissible in court, that would be a radical departure from any practice that this nation --

ATTY GEN. GONZALES: Sir, I don't believe that we're currently contemplating that occurring. I don't believe that would be part of what the administration is considering.

SEN. WARNER: Go ahead, John.

SEN. MCCAIN: I might add that the JAGs this morning testified before the Judiciary Committee that coerced testimony should not be admissible. How do you feel about that?

ATTY GEN. GONZALES: Sir, again, our current thinking about it is that coerced testimony would not come in if it was unreliable and not probative. Again, this would be a judgment made by the military judge, again, certified military judge, and it would be quite consistent with what we already do with respect to combatant status review tribunals. And this was reflected in the Detainee Treatment Act that evidence that was coerced could be considered and is being considered so long as it's reliable and probative.

SEN. MCCAIN: I assume that the Department of Justice has produced their analysis of the interrogation techniques permitted under the Detainee Treatment Act. Is that true?

ATTY GEN. GONZALES: We have provided legal advice, yes, sir.

SEN. MCCAIN: So -- but in your statement you want Congress to do that?

ATTY GEN. GONZALES: I'm sorry, Senator.

SEN. MCCAIN: In your statement, "Congress can help by defining our obligations under Section 1 of Common Article 3."

ATTY GEN. GONZALES: Clearly, sir, I think it would be extremely helpful to have Congress, with the president, define what our obligations are under Common Article 3. It is quite customary for the United States Congress, through implementing legislation, to provide clarity to terms that are inherently vague in a treaty. And so this would be another example. I think that makes sense.

SEN. MCCAIN: All right, on this issue of inhumane treatment, I think we're going to have to -- my time has long ago expired -- have an extended discussion about that aspect of this issue, Mr. Attorney General. And I want to thank both you and Secretary England for the hard work you've done on this issue.

I thank you, Mr. Chairman.

SEN. WARNER: (Off mike.)

SEN. MCCAIN: Well, I did mention to Secretary England I hoped that we could get the field manual done, since it's been eight months since we passed the law.

MR. ENGLAND: Mr. Chairman, I responded affirmatively.

SEN. WARNER: Good. I just wanted to make the record reflect that.

MR. ENGLAND: Yes, sir.

SEN. WARNER: Senator Clinton.

SEN. CLINTON: Thank you, Mr. Chairman.

And welcome, General Gonzales, Secretary England.

Secretary England, I appreciate very much your being here, because I think it is important, and I assume you agree, to have our civilian leadership testify before this committee.

MR. ENGLAND: Yes, I do.

SEN. CLINTON: Secretary England, I'm not sure you're aware, but the leadership of this committee, Chairman Warner, formally invited Secretary Rumsfeld to appear before us in an open hearing tomorrow, alongside General Pace and General Abizaid, because of the pressing importance of the issues to be discussed; namely, Iraq, Afghanistan, the Middle East, our country's policies affecting each of those areas.

Unfortunately, Secretary Rumsfeld has declined to do so. He has instead opted to appear only in private settings. I understand yesterday he appeared behind closed doors with the Republican senators. I'm told tomorrow he will be appearing again behind closed doors with all senators.

But I'm concerned, Mr. Secretary, because I think that this committee and the American public deserve to hear from the secretary of Defense. We're going to be out in our states for the recess. Obviously these matters are much on the minds of our constituents. And I would appreciate your conveying the concern that I and certainly the leadership, which

invited the secretary to be here, have with his inability to schedule an appearance before this committee to discuss the most important issues facing our country.

I appreciate your agreement that it is important to have our civilian leadership appear, and obviously we will look forward to having our military leadership tomorrow. But I think it's hard to understand why the secretary would not appear in public before this committee, answer our questions, answer the questions that are on the minds of our constituents.

SEN. WARNER: If you would yield, Senator, on my time, not to take away from yours. You're accurate. Senator Levin and I did, as we customarily do, wrote the secretary, as well as the chairman of the Joint Chiefs and General Abizaid. The secretary made a special effort to get General Abizaid over here such that he could appear before the committee.

It was the intention of myself as chairman that tomorrow's very important hearing focus on the military operations being conducted in Iraq and Afghanistan and the impact of other military operations by other countries in the theater of Israel, Lebanon and Palestine.

I discussed with the secretary and at no time did he refuse to come up here. I simply had to coordinate this with the leadership of the Senate, most importantly my leader, and he felt it would be desirable for the whole Senate to have a panel, consisting of the secretaries of State, Defense, chairman of the Joint Chiefs and General Abizaid. And, given that option, the decision was made that we would do that one as opposed to both, given the secretary's schedule. So I did not detract that from your time.

SEN. CLINTON: Well, Mr. Chairman, I appreciate the explanation. I think it is abundantly clear, however, to the members of this committee, as it is to countless Americans, that the secretary has been a very involved manager in the military decision-making that has gone on in the last five years. And, in fact, in recent publications, there's quite a great deal of detail as to the secretary's decision- making; one might even say interference, second-guessing, overruling the military leadership of our country.

And I, for one, am deeply disturbed at the failures, the constant, consistent failures of strategy with respect to Iraq, Afghanistan and elsewhere. And I don't think that those failures can be appropriately attributed to our military leadership.

So although the secretary finds time to address the Republican senators, although he finds time to address us behind closed doors, I think the American people deserve to see the principal decision-maker when it comes to these matters that are putting our young men and women at risk. More than 2,500 of them have lost their lives. And this secretary of Defense, I think, owes the American people more than he is providing.

So I appreciate the invitation that you extended, as is your wont. You've worked very hard, I know, to create the environment in which we would have the opportunity to question the secretary. Unfortunately, he chose only to make himself available to us behind closed doors, out of view of the public, the press, our constituents, our military and their families. And I think that is unfortunate.

SEN. WARNER: I would only add that we have under consideration a press conference following his appearance before the senators tomorrow. And further, we have under discussion, as soon as the Senate returns in September, an overall hearing on many of the issues which the distinguished senator from New York raises.

SEN. CLINTON: I thank you, Mr. Chairman.

SEN. WARNER: Thank you very much.

SEN. CLINTON: Attorney General Gonzales, I want to follow up on the line of questioning from Senator McCain, because I'm frankly confused. You testified with respect to Common Article 3, and I think we have clarified that perhaps your statement was not fully understood, because you stated the U.S. military had never before been in a conflict in which it applied Common Article 3 as the governing detention standard.

You acknowledge, however, that we have frequently applied the higher standard of the Geneva Conventions to regular and lawful combatants who are captured as prisoners of war. And, in fact, you agree with the JAGS who appeared before us that that is the standard that our military trains to.

Now, why not then apply the higher standard? Why go seeking another standard? Apply the standard to which we are already training our troops rather than trying to come up with a different, perhaps lower standard, that would provide for less protective treatment of detainees?

ATTY GEN. GONZALES: Senator, that is certainly a policy decision that one could adopt. The court, however, did not say that all of the protections of Geneva apply to our conflict with al Qaeda. The court simply said that Common Article 3 applies to our conflict with al Qaeda.

And that's the problem or issue or challenge that's been created as a result of the Hamdan decision. And that's what we're trying to do in this legislation is trying to address that particular issue that's been created as a result of that decision.

SEN. CLINTON: Do you anticipate the legislation will include United States citizens as enemy combatants?

ATTY GEN. GONZALES: No, ma'am. First of all, with respect to procedures under Military Commission Order 1, there was never any question that it would not apply to trials of American citizens. And I can say with confidence that there is agreement within the administration that the commission procedures that we would have Congress consider would not relate to American citizens.

SEN. CLINTON: Now, I know that we keep coming back to this distinction that seems to be at the heart of the disagreement over the treatment of these people, whatever we call them. And some in the administration, as I understand it, have argued that there should be a distinction between unlawful enemy combatants, those who act in violation of the laws and customs of war, and so-called lawful enemy combatants, who might be, for example, full members of the regular armed forces of a state party.

How do those categories, the lawful enemy combatants, differ from what is commonly known as prisoners of war? Is there a difference between a lawful enemy combatant and a prisoner of war?

ATTY GEN. GONZALES: Yes, Senator, there is a difference. I think if you're a prisoner of war, you get the protections under the Geneva Conventions that we normally think of with respect to the Geneva Convention. And our soldiers are entitled to those protections because they fight according to the laws of war. They carry weapons openly. They wear a uniform. They operate under a command structure. And so they would be entitled to all of the protections under the Geneva Convention.

But the Geneva Convention is a treaty between state parties. And, for example, the president made a determination that in our conflict with al Qaeda, the requirements of the Geneva Conventions would not apply because al Qaeda is not a signatory party to the Geneva Convention, and therefore they would not be entitled to all of the protections of the Geneva Convention.

However, the president made a decision that nonetheless they would be treated humanely, consistent with the principles of the Geneva Convention.

The president also made a determination that with respect to the Taliban, they were -- Afghanistan was a signatory to the Geneva Convention. However, because they did not fight according to the requirements of the Geneva Convention, that they would not -- they too would not be afforded the protections of prisoners of war under the Geneva Convention.

SEN. CLINTON: Well, then, just to finish, you would then make the argument that during the Vietnam War, we would have treated a North Vietnamese prisoner different from a Vietcong prisoner?

ATTY GEN. GONZALES: I probably don't know what -- I'd hesitate to answer that question. It's conceivable given their status. My recollection about the governing or ruling government in that country makes it difficult for me to answer that question. But it's conceivable, yes, ma'am.

SEN. CLINTON: Thank you.

SEN. WARNER: I'd like to invite Senator McCain to --

SEN. MCCAIN: We didn't -- we didn't treat them differently.

SEN. WARNER: Thank you, Senator.

Senator Lindsey Graham.

SEN. LINDSEY GRAHAM (R-SC): Thank you, Mr. Chairman.

This is a very interesting area of the law, and I think it's important we go over it because I was the one asking the questions of the JAGs of what you're trained to. And I'll try the best I can, and please the legal people here that know this better than I do, just chime in if I get it wrong.

But what we train our folks to do is when they capture someone on the battlefield, that they don't become a military lawyer; they're just a soldier. And what we tell everybody in uniform, that if you capture somebody, apply POW Geneva Convention standards to the captive. Is that correct?

MR./ATTY : Yes, sir.

SEN. GRAHAM: That is higher than Common Article 3. Part of the POW Geneva Convention standards that Senator McCain probably knows better than anyone else is a reporting requirement. If you're a lawful combatant -- and Mr. Attorney General, I think I disagree with your answer to Senator Clinton -- a lawful combatant is a POW. And one of the things that we've tried to ensure in the Geneva Conventions is, as soon as someone is captured, the host country has an obligation to inform the international community that that prisoner has been captured and their whereabouts and their physical condition.

I don't know how Senator McCain's family found out about him being captured, but everybody in his situation, the North Vietnamese, not exactly the best people to use as a model here when it comes to Geneva Convention compliance. But eventually, we were informed about who was in their capture.

The problem we have as a nation, if you capture Sheikh Mohammed, do we want to tell the world within 48 hours we have him? I would argue that we would not because it might compromise our war operations. And I think what the JAGs were telling us is that from the soldier's point of view, don't confuse them. Saddam Hussein was treated as a POW. If we caught bin Laden tomorrow, if a Marine unit ran into bin Laden tomorrow, my advice to them would treat him as a POW.

However, I do not believe that bin Laden deserves the status of POW under Convention Article 3. Common Article 3 applies to all four sections of the Geneva Convention, and Common Article 3 says this is the minimum standard we'll apply to a person in your capture regardless of their status.

So I would argue, Mr. Chairman, that there is a significant distinction between a lawful combatant and an unlawful combatant, and our law needs to reflect that for national security purposes.

But I'd also like to associate myself with Senator McCain. How we treat people is about us. Even if you're an enemy combatant, unlawful, irregular enemy combatant, I think the McCain amendment is the standard in which we should adhere to, because it is about us, not them.

The problem we have is not the soldier on the front line who captures bin Laden, it's that when you turn him over to the CIA or military intelligence, the question becomes then, are the interrogations of unlawful enemy combatants bound or bordered by Common Article 3? And I would argue, colleagues, that there is not one country in this world that conducts terrorist interrogations using Common Article 3 standards, because that means you can't even say hello to them, hardly.

The purpose of this endeavor is to get military commissions right with Hamdan and right with who we are as a nation. So I'm going to be on the opposite side of you on classified information. Reciprocity is the key guiding light for me. Do not do something in this committee that you would not want to happen to our troops. The question becomes, for me, if an American servicemember is being tried in a foreign land, would we want to have that trial conducted in a fashion that the jury would receive information about the accused's guilt not shared with the accused, and that person be subject to penalty of death? I have a hard time with that.

Telling the lawyer doesn't cut it with me either, because I think most lawyers feel an ethical obligation to have information shared with their client. And I would ask you to look very closely at the dynamic of whether or not you can tell a lawyer something and the lawyer can't tell the client, when their liberty interest is at stake. I think you're putting the defense lawyers in a very bad spot.

So the question may become for our nation, if the only way we can try this terrorist is disclose classified information and we can't share it with the accused, I would argue don't do the trial. Just keep him. Because it could come back to haunt us.

And I have been in hundreds of military trials. And I can assure you the situation where that's the only evidence to prosecute somebody is one in a million. And we need not define ourselves by the one in a million.

Now, when it comes to hearsay, there are 27, I think, exceptions to the military hearsay rule. I'm willing to give you more. The International Criminal Court does not have a hearsay rule, so the international standard is far different than the standard we have in federal rules of evidence and military rules of evidence. But I think it would do us well as the country, serve us well as the country to set down and come up with a hearsay rule that has exceptions for the needs of the war on terror, not just ignore the hearsay rule in general.

So I haven't asked one question yet. I made a lot of speeches. And I'm sorry to take the committee's time up.

I would end on this thought.

SEN. WARNER: Well, we'll give you a little extra time to ask one question.

SEN. GRAHAM: Well, this is very complicated. It means a lot to all of us. And we got a chance to start over.

And Mr. Attorney General, Secretary England, I appreciate what you've done with Mr. Bradbury and others. I'm very pleased with the collaborative process. And here's where I think we've come to include. The political rhetoric is now being replaced by sensible discussions.

Mr. Attorney General, do you believe it is wise for this country to simply reauthorize Military Commission Order 1 without change?

ATTY GEN. GONZALES: I think the product we're considering now is better.

SEN. GRAHAM: So the testimony that was given to the House by a member of the Department of Justice -- that it sounds good to me just to reauthorize Military Order 1 -- would probably not be the best course of conduct?

ATTY GEN. GONZALES: I think -- again, I think what we are considering now is a better product.

SEN. GRAHAM: Do you agree with the evolving thought that the best way to approach a military commission model is start with the UCMJ as your baseline?

ATTY GEN. GONZALES: That's what we have done.

SEN. GRAHAM: Okay. I think we're making great steps forward. I really, really do.

And I couldn't agree with you more that when it comes to Title 18 -- now, the committee needs to really understand this. If you're in charge of a detainee and you're a military member, two things govern your conduct, Title 18 and the UCMJ, I think it's Article 93. It is a crime in the military to slap a detainee. A simple assault can be prosecuted under the UCMJ through Article 15, non-judicial punishment or a court-martial of a variety of degrees.

What we don't want to happen, I think, is to water down the word "war crime." We need to specify in Title 18 what is in bounds and what is not, because our people in charge of these detainees could be prosecuted for felony offenses.

And, Mr. Attorney General, I think you're correct in wanting to give more specificity -- be more specific instead of just using Common Article 3. And I'd like to work with you to do that.

The last thing is inherent authority. I had a discussion with you several months ago and I asked you a question in Judiciary Committee: Do you believe that the Congress has authority, under our ability to regulate the land and sea and naval forces and air forces, to pass a law telling a military member you cannot physically abuse a detainee? The McCain Amendment. Do we have the authority to do that?

ATTY GEN. GONZALES: I think you do have the authority to pass regulations regarding the treatment of detainees, yes sir, I do.

SEN. GRAHAM: We're making tremendous progress. Thank you.

SEN. WARNER: Thank you very much.

I see no colleagues on this side who have not had the opportunity to speak, so I now turn to Senator Collins.

SEN. SUSAN COLLINS (R-ME): Thank you, Mr. Chairman.

Secretary England, I'm trying to reconcile your actions in response to the court's decision with the testimony of the attorney general today. In response to the court's decision, on July 3rd you issued an official memorandum which applied all aspects of Common Article 3 to detainees.

Is that correct?

SEC. ENGLAND: That's correct.

SEN. COLLINS: And I applaud you for doing that and taking action quickly to comply with the Supreme Court's decision.

Now, Mr. Attorney General, in your testimony today, you say that some of the terms in Common Article 3 are too vague. You, for example, cite "humiliating and degrading treatment," "outrages upon personal dignity." If it's too vague, how is it that Secretary England is able to apply those same standards to the treatment of detainees?

ATTY GEN. GONZALES: Well, I think that even though the secretary's actions were the correct actions, even the JAGs believe that because now we're talking about prosecution for commission of a felony, there does need to be absolute certainty -- or as much certainty as we can get in defining what it is -- what would constitute a violation of Common Article 3. It's one thing to engage in conduct that may violate the UCMJ, it's another thing if that same conduct all of a sudden becomes a felony offense in which the Department of Justice is now involved in. And I think we all agree, there's universal agreement that if there's uncertainty, if there's risk, we need to try to eliminate that uncertainty, we need to try to eliminate that risk.

I think that there are certain actions that we all agree would violate Common Article 3: murder, rape, maiming, mutilation. No question about it.

But there are some foreign decisions that provide a source of concern. And the Supreme Court has said, in interpreting our obligations under the treaty, we are to give respectful consideration to the interpretation by courts overseas, and also to give weighty -- to give respectful consideration to the adaptation or the interpretation by other state parties to those words.

And so, what we're trying to do here, again, working with the JAGs, is trying to provide as much certainty as we can so that people are not prosecuted by the Department of Justice for actions that they didn't realize constituted a war crime.

SEN. COLLINS: Secretary England?

MR. ENGLAND: Senator, this has been a significant issue for the Department of Defense. As a matter of fact, it was part of the discussion of the field manual in eight months, and part of that's all part of this discussion in terms of trying to define these terms. And now it is very important, because while we have complied in the past and trained to it, it is now a matter of law. And as a matter of law, there's consequences, because --

(To Att'y Gen. Gonzales) Is it the War Crimes Act, Mr. Attorney General?

ATTY GEN. GONZALES: Right.

MR. ENGLAND: The War Crimes Act now makes U.S. personnel -- they can be prosecuted if they don't comply with Common Article 3. So those words now become very, very important. So, degrading treatment, humiliating treatment, that's culturally sensitive terms. I mean, what is degrading in one society may not be degrading in another, or it may be degrading in one religion, not in another religion. So -- and since it does have an international interpretation, which is generally frankly different than our own, it becomes very, very relevant. So, it's vitally important to the Department of Defense that we have legislation now and clarify this matter, because now that it is, indeed, a matter of law, it has legal consequences for our men and women and civilians who serve the United States government.

SEN. COLLINS: Mr. Attorney General, I want to follow up on a comment that Senator Graham made in his questioning of you. He pointed out the dilemma of giving access to classified information to a detainee who's being brought to trial. And he says what happens now is that if it were an American citizen who is a member of the armed forces and you needed to protect that information, then the trial doesn't go forward. And Senator Graham suggested that in this case the result is that the detainee is not tried but simply held. But I wonder if you're troubled by that outcome. It seems to me if the result is that the detainee is held without trial for a non-ending amount of time, that that raises real concerns as well. And I wonder if that's a fair outcome --

ATTY GEN. GONZALES: Well, I -- I don't know --

SEN. COLLINS: -- that results in him not having access to classified information if he doesn't get his time in court, and -- but he's held. I mean, that's punishment --

ATTY GEN. GONZALES: I don't know -- I don't know whether or not I can comment on whether or not it's a fair result. I do know that at the end of the day I don't think the United States -- this administration, I don't Department of Defense and Deputy Secretary England can comment on this -- want to remain the world's jailers indefinitely.

Obviously, we hold people because we are engaged in a conflict with al Qaeda and there's a military necessity to hold people. I think generally, the American people would like to see some kind of disposition sooner as opposed to later. They don't want these people released, but if in fact they can be prosecuted for committing crimes against America, I think the American people would like to see that happen. And so it may make sense to at least have that opportunity available. That's the whole reason we want to have military commissions.

Obviously, there's a great deal of political pressure on this administration to close Guantanamo. Well, we have to do something with the folks at Guantanamo. We can return them back to their home countries. Sometimes that's difficult to accomplish. We can release them, but we can only release them if we're confident they're not going to come back and fight against America. And we already know that there have been some instances where that has happened. And so that's a decision that is one that is very weighty and we have to exercise with a great deal of care.

And so another alternative is to try to bring them to justice through military commissions. And again, I think it would -- it's going to be an extraordinary case when we will absolutely need to have classified information to go forward with the prosecution that we cannot share with the accused. But I think it's something that we really ought to seriously consider to have remaining as an option.

And to get back to one final point for Senator Graham, we contemplate a provision in the legislation which would make it quite clear that the provisions of the military -- procedures of the military commissions would not be available -- could not be used against anyone that the president or the secretary of Defense determined was a protected person under Geneva, or a prisoner of war, or qualify for prisoner of war status under Geneva. And therefore, if another country captured an American soldier and they said, "Okay, we're going to use your military commission procedures that you passed on this American soldier," well, according to the very terms of the military commission procedures that we're contemplating, they could not do that.

SEN. COLLINS: Thank you.

SEN. GRAHAM: Could I -- Mr. Chairman?

SEN. MCCAIN: Senator Nelson.

(To Senator Graham) Did you want --

SEN. GRAHAM: I just wanted to respond to that comment, but I'll -- I'll defer.

SEN. MCCAIN: Do you mind, Senator Nelson?

SEN. BENJAMIN NELSON (D-NE): I don't mind.

SEN. GRAHAM: I guess what I was trying to say, only 10 percent or less, I believe, of the enemy combatants have been scheduled for military commission trial. Is that correct?

ATTY GEN. GONZALES: To date. But there's a reason for that, Senator.

SEN. GRAHAM: Well, I think there's a good reason. Every enemy combatant's not a war criminal. And I don't want us to get in a situation where every POW is a criminal. If you're fighting lawfully and you get captured, you're entitled to being treated under Geneva Convention. Every enemy combatant is not a war criminal. So we don't want to get in the dilemma that you got to prosecute them and let them go, because that's not a choice that the law requires you to make.

But once you decide to prosecute somebody, the only point I'm making, Mr. Attorney General, when you set that military commission up, it becomes a model, it becomes a standard. And the question I have is that we have some Special Forces people who are not in uniform that may fall outside the convention, that may be relying on Common Article

3. That may be the only thing left to them in foreign hands. So what we do with irregular enemy combatants could affect the outcome of our troops who are in the Special Forces field. And that's what we need to think about.

SEN. MCCAIN: Senator Nelson.

SEN. BENJAMIN NELSON: Thank you, Mr. Chairman. And I want to thank the witnesses as well for being here today to help us understand this effort to come into compliance with the Supreme Court decision and the importance of doing it in a lawful way in handling enemy combatants.

Now, if my colleague from South Carolina is right that not every enemy combatant is a war criminal, and not every enemy combatant has to be tried, is it your opinion, Mr. Attorney General, that someone could be held for the duration, even though not tried, however long the duration is, even in a war against terror, as opposed to a more traditional war that typically has a beginning and, to date, has always had some sort of an ending?

ATTY GEN. GONZALES: Senator, not only is that my opinion; that is a principle that has been acknowledged by the Supreme Court.

SEN. NELSON: And so the only purpose of trying to have commissions, in effect, is to try people who are enemy combatants as an example, who we believe have committed war crimes; that we want to bring war crime prosecution against them and hold them as war criminals? Is that correct?

ATTY GEN. GONZALES: Yeah, I -- it's an additional tool that I believe is necessary and appropriate for a commander in chief during a time of war. Yes, sir.

SEN. NELSON: Okay.

Mr. Secretary, does your memo on Common Article 3 extend to contractors who are performing interrogations, as opposed to just simply members of the military who might perform interrogations of enemy combatants or people who are suspected of being enemy combatants? In other -- outside contractors --

MR. ENGLAND: Yeah --

SEN. NELSON: -- non-uniformed individuals -- do they fall under Common Article 3 as well?

MR. ENGLAND: Senator, I will have to get back with you. I mean, frankly, at the time I put out the memo, I wasn't thinking of contractors. I was thinking people in the Department of Defense. So --

SEN. NELSON: And there wouldn't be any question about a translator, for example, but there could be a question about contractors, because wasn't that one of the questions in Abu Ghraib and other circumstances where there were others performing interrogations?

MR. ENGLAND: So, Senator, I will need to get back with that.

SEN. NELSON: Okay. And then if we turn over any detainees to other governments -- let's say Pakistan or Afghanistan -- are they subject to Common Article 3, for their protection?

ATTY GEN. GONZALES: Well, sir, we have an obligation not to turn them over to a country where we believe they're going to be tortured. And we seek assurances, whenever we transfer someone, that in fact that they will not be tortured.

SEN. NELSON: So are we fairly clear or crystal-clear that in cases of rendition, that hasn't happened?

ATTY GEN. GONZALES: Well, of course, Senator, rendition is something that is not unique to this conflict --

SEN. NELSON: Oh, no, I know.

ATTY GEN. GONZALES: -- not to -- (inaudible) -- this administration or this country.

SEN. NELSON: No, no, I'm not trying to suggest that. I'm just trying to get clear --

ATTY GEN. GONZALES: I cannot -- you know, we are not there -- (chuckles) -- in the jail cell in foreign countries where we render someone. But I do know we do take steps to ensure that we are meeting our legal obligation under the Convention against Torture and that we don't render someone to a country where we believe they're going to be tortured.

SEN. NELSON: So we would want to see Common Article 3 applied in every situation where we may turn a detainee over to another country. We would take every action we could be expected to take to see that they -- that that was complied with, or is that expecting more than we can commit to?

ATTY GEN. GONZALES: Well, sir -- I mean, the Supreme Court made no distinction in terms of military contractors or military soldiers. The determination was that Common Article 3 applies to our conflict with al Qaeda.

SEN. NELSON: Thank you, Mr. Chairman. Thank you for your answers.

SEN. WARNER: Thank you, Senator Nelson.

We now have -- the next one is Senator Cornyn.

SEN. JOHN CORNYN (R-TX): Thank you, Mr. Chairman.

Secretary England, General Gonzales, welcome, and thank you for being here today. And let me congratulate the Department of Justice, Department of Defense on the diligence with which you've undertaken this challenge to try to address the concerns and the decision of the Supreme Court in the Hamdan case.

My questions don't have so much to do with the nature of the trial, because, to me, that seems like that's the easiest part of this to deal with. In courtrooms and cities and all across this nation, we have trials going on, civil and criminal trials; we have court-martial proceedings. We kind of understand sort of the basic parameters of what a fair proceeding looks like, and the Supreme Court seemed to say -- or more than just seemed to say -- that it was appropriate that the general rules that would apply to a fair trial could be adjusted and adapted as appropriate to the nature of the military commission and the exigencies of trying individuals, unlawful combatants during a time of war.

But I think that based on what Senator Graham sort of questions that he asked and the answers that you gave, I don't think that's that hard, and I think what the work that you -- that the administration has done, the proposals that have been discussed, we can do that.

What concerns me the most is, when I look at the nature of the intelligence that's been obtained through interrogation of detainees at Guantanamo, it includes the organizational structure of al Qaeda and other terrorist groups; the extent of terrorist presence in Europe, the United States and the Middle East; al Qaeda's pursuit of weapons of mass destruction; methods of recruitment and locations of recruitment centers; terrorist skill sets, including general and specialized operative training; and how legitimate financial activities can be used to hide terrorist operations. Those are the sorts of things that have been gleaned through interrogation of unlawful combatants at Guantanamo Bay.

And if you agree with me -- and I'm sure you do -- that we ought to use every lawful means to obtain actionable intelligence that will allow us to win and defeat the terrorists, the question I have for you is, why in the world -- and not just you -- the question I would ask rhetorically is, why would we erect impediments to our ability to gain actionable intelligence over and above what is necessary to comply with the Supreme Court's decision in Hamdan?

And while we've heard a lot of testimony during the course of these hearings about the nature of the proceeding that's required by the Supreme Court decision, what we haven't heard enough about, in my view, is what concerns that we should have about erecting additional impediments maybe not required by the Supreme Court decision but, if we're not careful, raising new barriers to our ability to get actionable intelligence.

And I'd like to ask Secretary England if he would address that, and then Attorney General Gonzales.

MR. ENGLAND: Senator Cornyn, I'm listening, but I'm not aware of these additional barriers that we're constructing.

SEN. CORNYN: Well, let me try to be clear. There's been some suggestion -- and I think -- that the Geneva -- the Supreme Court held that the Geneva Conventions broadly speaking apply to al Qaeda. Senator Graham said, and in previous testimony I believe Attorney General Gonzales has addressed his belief that that is not true; even though Common Article 3 would apply, that Geneva Convention broadly speaking does not apply to confer POW status on al Qaeda.

And what I'm speaking about particularly is Article 17 of the Third Geneva Convention says that prisoners of war who refuse to answer may not be threatened, insulted or exposed to unpleasant or disadvantageous treatment of any kind.

And what I'm concerned about is, if we somehow through an act of Congress in effect hold that unlawful combatants like al Qaeda are entitled to protections such as Article 17 of the Geneva Convention, what that would do to our ability to gather intelligence if they could not be exposed to unpleasant or disadvantageous treatment.

I hope that helps clarify.

MR. ENGLAND: I guess my understanding is, is the legislation deals specifically with Common Article 3. That is, it does not elevate to full POW status, so it deals with basically the law that was addressed in Hamdan; that is, that Common Article 3 applies, and that is what the nature of this legislation is. So I'll let the attorney general expand, but I believe that we have limited this legislation specifically to Common Article 3 and the application of Common Article 3 to military commissions.

SEN. CORNYN (?): That's my understanding as well.

ATTY GEN. GONZALES: Senator, you raise a very important point. We are engaged in an ongoing conflict. A lot of people refer to procedures and proceedings of other tribunals that occurred after the conflict was over, when there was a lot less concern about access to classified information and sharing of information.

Clearly, in this kind of conflict, the gathering of information, of intelligence is critical. It is so important. It is one reason why we suggest that we not use or have Article 31 of the UCMJ as part of the procedures for military commissions, which requires Miranda rights as soon as somebody's under suspicion of having committed some kind of crime. That makes no sense when you're on the battlefield and you want to -- you want to grab someone. You know that already they're a suspect, but you need more information. It's important to be able to question them. And the notion that you'd have to read them their rights and give them lawyers at the outset, of course, makes no sense.

But more to your point about the application of Geneva. Clearly, I think that there are consequences that follow from a decision that al Qaeda should be afforded all the protections under Geneva. It will affect our ability to gather information. There's no question about that. Clearly, the requirements of Common Article 3 place some limits, but they're limits very consistent with what the president has already placed upon the military since February of 2002. And we believe that we can continue to wage this war effectively under Common Article 3, assuming that Congress provides some clarity about what those obligations are, because there are some words that are inherently subject to interpretation. And I think it makes sense, once again, to have Congress provide clarity about what our obligations are under Common Article 3.

SEN. CORNYN: General Gonzales, of course, Congress has spoken on the Detainee Treatment Act, providing appropriate but limited judicial review for -- in a habeas corpus setting for these detainees. Is it your -- is it your opinion that we can, consistent with the Supreme Court decision, if we were to apply the provisions of the Detainee Treatment Act, including the McCain amendment for treatment of detainees that provide proceedings for the trial of the -- of the detainees by military commission, as you have proposed, that that would be sufficient to comply with the concerns raised by the court?

ATTY GEN. GONZALES: Well, of course, the court -- the court really took no action with respect to -- when I say "the court" -- five members of the court, a holding of the Supreme Court of the United States, there were not five members of the court that said this particular provision is unconstitutional or unlawful. What the court said, Mr. President, if you want to use procedures that are not uniform with the Uniform Code of Military Justice, you can't do that unless you -- there are practical reasons for doing so. If you -- otherwise you have to use the procedures of the Uniform Code of Military Justice, or have Congress codify what those procedures will be. And so, you know, again, the Uniform Code of Military Justice is a creature of Congress. If Congress wants to change that or use those procedures or deviate from those procedures, I think Congress has the authority to do so.

SEN. CORNYN: My last question has to do with the application of the Detainee Treatment Act to pending cases that are in the federal court system. Obviously, Congress intended the Detainee Treatment Act would provide an exclusive method of judicial review of habeas petitions emanating out of Guantanamo, but it was not expressly in the legislation applied to all pending cases. Is it your judgment and recommendation to Congress that we apply in the course of the legislation that we file here -- whatever we pass that would apply to all pending cases, including the provisions of the Detainee Treatment Act?

ATTY GEN. GONZALES: That would be the recommendation of the administration, Senator. We are currently burdened by hundreds of lawsuits for all kinds of matters relating to conditions of cells, conditions of recreation, the types of books that people can read. And so, again, we believe that the process that we had set up, the combatant status

review tribunal process, combined with the annual review boards, combined with review -- appeal up to the D.C. Circuit, we believe that these provide sufficient process to detainees. And we believe that all of this litigation should be subject to the Detainee Treatment Act.

SEN. CORNYN: Thank you very much.

Thank you, Mr. Chairman.

SEN. WARNER: (Off mike) -- colleagues will proceed after Senator Sessions to have another round.

Senator Sessions at this time.

SEN. JEFF SESSIONS (R-AL): Thank you very much.

You know, our JAGs say, well, we train to Common Article 3. But I used to train soldiers in the Army Reserve, and I had to teach them the Geneva Conventions. And what we were training to were for lawful prisoners of war. We were training to people who complied with the Geneva Conventions, were entitled to the protections of the Geneva Conventions.

Now, I just want to say, I respect the JAG officers. I held a JAG slot for a short period of time, but I never had my Charlottesville training, so I don't claim to be anything like a legitimate JAG officer. But I would just say that with regard to these unusual areas, unlawful combatants who renounce all principles of warfare, who openly behead people, who take it as their right to kill innocent men, women and children to further their agenda, this is an unusual thing for the military to deal with. And I think the president -- I'm just going to be frank. I think the president had every right to call on his counsel and the Department of Justice to ask what authorities and powers he had, and I don't believe he was constrained to follow the Uniform Code of Military Justice in handling these.

And Secretary England, would you agree with that?

MR. ENGLAND: Yes, sir, I agree with that.

SEN. SESSIONS: Mr. Attorney General, you've been in the middle of that. Wouldn't you agree with that?

ATTY GEN. GONZALES: Well, certainly, Senator, based upon our reading of precedent and previous court decisions, we believe the president did have the authority to stand up these commissions with these procedures, which provided much more process than any other commission process in history. But the Supreme Court has now spoken in Hamdan.

SEN. SESSIONS: Well, I agree. And I would just ask you, from my reading of it, it appears to me that the Supreme Court to reach the conclusion it did really had to reverse the existing authority of the U.S. Supreme Court Ex Parte Quirin.

Would you agree with that?

ATTY GEN. GONZALES: Again, Senator, there are many aspects of the opinion that I would question and that I would love to have discussed --

SEN. SESSIONS: Well, I'll just ask you this. You believed, did you not, that these procedures complied with the Supreme Court authority in Ex Parte Quirin, and you attempted to follow Supreme Court authority when you set up these commissions, did you not?

ATTY GEN. GONZALES: No question about it, Senator, that lawyers at the Department of Justice and certainly in the White House believed that the president had the authority and that these procedures would be consistent with the requirements under the Constitution.

Can I just say one thing, Senator?

SEN. SESSIONS: Yes.

ATTY GEN. GONZALES: I've heard a lot of people say, "Well, how could you be surprised, how could you guys get this wrong?" You know, these are hard issues, and we were right all the way up until June 29th, 2006. We had a D.C. Circuit opinion that said, "You're right, Mr. President."

I also would remind everyone that six of the eight justices wrote in that case -- six of the eight -- there was 177 pages worth of analysis. So for those people who say this was such an easy issue, I beg to differ. If you look -- it's easy

to criticize after the fact, but these were very, very hard issues, and assuming that Justice Roberts would have stayed with his position on the Supreme Court -- as you know, he voted on the D.C. Circuit opinion -- it would have been a 5 to 4 decision.

This is a very tough, very close issue.

SEN. SESSIONS: Well, I couldn't agree more, and I just don't think the president and the Department of Justice or Department of Defense needs to be hung out there suggesting that you're way off base. It was a 5 to 4 opinion, very complex, and even then, it was not harshly critical of the Department of Justice. It just set some standards that now we've got to figure out how to comply with.

Now, let's talk about this Uniform Code of Military Justice. This is a trial procedure and sets the standards for treatment of American soldiers who have been charged with crimes; is it not? I mean, this is a standard -- this is a manual for trying soldiers who may have committed crimes, American soldiers.

ATTY GEN. GONZALES: And an overwhelming number of those crimes, as I believe to be the case, don't relate to crimes that are committed in battle or on the battlefield.

SEN. SESSIONS: Oh, absolutely. Whether they committed assault or a theft or any of those things, are tried. And we give them in many ways more protections than an American would get tried in a federal court for a crime in the United States of America.

ATTY GEN. GONZALES: There is no question about that, that the procedures and rights that are provided to our service men are greater in many respects than you or I would receive in an Article 3 court.

SEN. SESSIONS: We just can't transfer that to the trial of the Nazi saboteurs that were described in the Ex Parte Quirin case, many of whom were tried and executed in fairly short order by President Franklin Roosevelt -- or under his direction.

Now, let's take the question of coercion. The federal law on coercion in criminal cases -- that used to be my profession. I spent more time prosecuting than I've done anything else in my professional career. It is very, very, very strong. For example, if a police officer hears an alarm going off and someone running away, and he grabs him and says, "What were you all doing and who was with you?" And the guy says, "My brother, Billy," that would be stricken as a coercive statement because he was in custody of the police officer and he didn't know he didn't have a right not to answer.

If a military officer questions a lower-ranking individual, they can -- they are protected from -- that's considered coercion because they may feel they have an obligation to answer that officer when they have a right not to give it.

I remember the Christian burial speech where the officer got the murderer to take him to the body of the little girl by saying, "She's lying out there in the snow. You ought to tell us where she is so we can get a Christian burial." Five to four, the Supreme Court said that was an involuntary confession.

All I'm saying -- and then you got the exclusionary rule. That is not required by the Constitution to the degree that we give it in the United States, or any fair system of law. Most nations do not create the exclusionary rule that says that if a soldier out on the battlefield improperly seized evidence, that that can't be utilized, or if a soldier apprehends somebody in an -- on the battlefield, and they confess to being involved in terrorism, that that would violate coercion by our standards. Surely, we're not going to make that excluded from evidence in a commission trial for a terrorist charge.

ATTY GEN. GONZALES: Clearly, Senator --

SEN. SESSIONS: You see what I'm saying?

ATTY GEN. GONZALES: Yes, sir.

SEN. SESSIONS: So I want to be sure, when you study this language and you -- y'all are going to have to take the lead on it and think all this through. But I'd like to say to you we need you to help us, because I have great confidence in the lawyer skills in the members of this committee and their commitment to doing the right thing, but we don't know all these details. We haven't studied that 170-page opinion, I hate to tell you. Some of them like to make us think we've all read it, but we haven't.

And so I guess I'm calling on you to do that. And let's be sure that these extraordinary protections that we provide to American soldiers and American civilians, because we live in such a safe nation that we can take these chances and

give these extra rights, that we don't give them to people who have no respect for our law and are committed to killing innocent men and women and children.

ATTY GEN. GONZALES: Senator, you've raised some good points. I would urge the committee to also consider that as we talk about whether or not coerced testimony should come in -- and again would remind the committee that our thinking is -- is that if it's reliable and if it's probative, as determined by a certified military judge, that it should come in -- that if you say that a coerced testimony cannot come in -- if I'm a member of al Qaeda, every one is going to claim this evidence has been coerced. And so then we'll get into, I think, a fight with respect to every prosecution as to what is in fact coerced and what is not coerced.

SEN. SESSIONS: And I guess questions of torture and things of that are what people think about when they think about coercion. But if we just adopt the UCMJ, we'll pick up all these other things that I just mentioned that I'm not -- that will often be -- will often turn on the action of an Army soldier who's never been trained like a police officer. And we have enough problems with police officers trying to do everything precisely right.

And I just -- I think you'll work on this correctly. I have good -- I have confidence in it. And I think we need to understand these things before we attempt to alter what I'm sure you'll come up with.

ATTY GEN. GONZALES: But let me be clear about this, Senator. There is agreement about this -- is that evidence derived from torture cannot be used.

SEN. SESSIONS: Yes.

Thank you, Mr. Chairman.

SEN. WARNER: Let's -- Senator Talent.

SEN. JAMES TALENT (R-MO): Thank you, Mr. Chairman.

My main concern through these hearings has been to make certain that our men and women have the ability to get the actionable intelligence that they may suspect is there.

Now, as I understand it, we already prohibited cruel and inhumane punishment.

And the issue -- let me just sum it up -- is what about degrading tactics? In other words, there may be tactics that are not cruel and inhumane but are degrading. And you've indicated you'd like us to provide guidance, and everybody here has said we want you to provide guidance.

What about if we came up with a list of what they could do? In other words, structure the -- and I'm talking about interrogations now. I'm not talking about trials afterwards, because there -- at least when you get to the trial point you've gotten the intelligence and you've acted on it from a military standpoint, so -- which is my main concern. What about if, between you all and us here in the Congress, we came up with a list for our men and women about what they could do? And they look at -- and you can play loud music. You know, you -- you can, even if the -- even if culturally the prisoner would feel degraded, you can have an all-woman interrogation team -- you know, a list of things that you could do. And then, perhaps, just say, look, if it's not on the list of things you could do, establish a process or a sign-off by somebody with some kind of oversight for other tactics that may or may not be degrading under the circumstances. If you'd answer that question, then also, if either -- maybe address if we did that, should the standard vary a little bit depending on how crucial the judgment is about the intelligence. Because I know, I -- personally I wouldn't -- I would want our people to push more into a gray area if they felt the intelligence was really crucial to saving American lives.

ATTY GEN. GONZALES: Well, of course, the idea that you propose regarding lists I think is obviously one that the -- that could be considered. The concern I always have about lists is what you forget to put on the list, but you proposed a possible solution, to provide a mechanism where additional items could be included on the list.

I, for one, am worried about different base line standards. We have already a base line standard under McCain: the McCain amendment, or DTA. And I think it may be wise to first consider whether or not that shouldn't also be the standard with respect to our obligation under Common Article 3, which ties it to a U.S. constitutional standard. It would prohibit cruel, inhumane and degrading treatment that is prohibited under the 5th, 8th and 1th Amendment.

Now, I don't know if that goes far enough, however, because you're talking about a task that is, in and of itself, still a little bit subjective. And for that reason, because we're talking about possible criminal prosecution under the War Crimes Act, I do think it makes sense, and I think the JAGs agree, that it is appropriate to have lists in the War Crimes

Act of those offenses, those activities, those actions which, if you do, you have violated the War Crimes Act and you can be prosecuted for a felony.

So that sort of is our current thinking, Senator. I'd be happy to -- we'd be happy to take back your your proposal and think about whether or not -- I mean, the benefits of it and whether or not there are other problems that I can't think of right now. But our current thinking is, is that -- is perhaps what we intend to propose to the Congress is that, guys, let's just have one standard. Everyone seems to be comfortable with the McCain standard, which is tied to a U.S. constitutional standard.

SEN. TALENT: Are you certain that that standard would pass muster under Article 3 of the Geneva Convention? My understanding is that --

ATTY GEN. GONZALES: Yeah, I am confident of that. Not only that -- again, you know, having been -- not brought to task, but highlighted by Senator McCain that my recollection of the JAGs' testimony was incorrect -- my recollection of the JAGs' testimony was that they felt comfortable that the McCain standard fits nicely, neatly within our obligation under Common Article 3. And I believe that to be true also.

SEN. TALENT: Well, I'll go back and check that too, because I thought that they believed more guidance was necessary on that point of what's degrading and what isn't. Because it certainly seems logical to me to believe that there may be interrogation tactics that are cruel and inhumane that are not degrading.

ATTY GEN. GONZALES: I think that they believed we needed additional clarification, and certainly would welcome additional clarification through the McCain Amendment as a possibility.

SEN. TALENT: Of course, one of the problems with a list is that it's telling, you know, the enemy what we're going to do or not do, so they can prepare, but of course, it seems to me we're in that boat one way or the other. So at least my concern now is that our interrogators feel comfortable enough that they don't draw back from something we would want them to do.

MR. ENGLAND: Senator, if I could make a comment here. The McCain Amendment refers to the Army Field Manual as a part of law. So earlier in this discussion, Senator McCain asked about the status of the Army Field Manual. And of course, that's what we've been dealing with these months, is trying to articulate better -- not a list per se, but to describe better for our men and women exactly what is permissible under the McCain Amendment, which, again, is grounded in the Constitution, so there's now a grounding in some of these terms that we didn't have before, and now we're trying to help interpret that for the men and women in the Army Field Manual.

And we have been working on that on some time, because you can well imagine it's complex for us to do to also reduce this to words in the field manual. But I expect that ultimately that perhaps, after we discuss this, that that, quote, "list" shows up in the Army Field Manual, not in the legislation per se.

And I guess, Attorney General, I know your views of that, but -- .

SEN. TALENT: I think I just got blue-slipped. And since I'm the last one, I'm not --

SEN. WARNER: Go right ahead and get -- (off mike).

SEN. TALENT: Well, again, I just think it's very -- the attitude of our interrogators, I think, is very important, and I don't want them to be afraid that they're going to be hung out to dry for making a fair call under difficult circumstances.

And maybe that's just, Mr. Chairman, the commitment of everybody on this end of Pennsylvania Avenue and on the other end of Pennsylvania Avenue that we're just not going to do that; you know, that we're not going to -- for whatever reason, we're not going to hang these men and women out to dry if they make a reasonable call under difficult circumstances. I don't want us to forego intelligence we should be getting because people are deterred in that way.

SEN. WARNER: I think that's a very fair statement, and I associate myself with that statement.

SEN. TALENT: Thank you, Mr. Chairman.

SEN. WARNER: Thank you.

Senator Thune.

SEN. JOHN THUNE (R-SD): Thank you, Mr. Chairman.

Mr. General, Mr. Secretary, thank you for appearing today, and thank you for providing your insights.

As has already been pointed out, these are very complex legal issues with lots of different bodies of law, from the more recently passed Detainee Treatment Act to the conventions to the UCMJ, which is why I think you had six different people writing opinions in the Supreme Court when they looked at this.

And not being a lawyer -- there are a number of lawyers on the committee, and obviously some great perspective and experience to bring to this issue. And I know we count upon you to get this right within the legal framework and the parameters that have been established for us to operate within.

As a non-lawyer, I would hope that, in looking at this issue, we can, at the end of the day, accomplish a couple of objectives what are -- that are consistent with principles that I think the people that I represent would like to see accomplished in this debate.

First and foremost, my main concern in this -- and I think it's been voiced by others here -- is that the protection of our own men and women who serve beyond our shores and the types of risks and jeopardy we put them in if we don't have our house in order here, so that colleagues like our colleague, Senator McCain, and the treatment that he endured when he was in detention for all those years, that's something we really want to avoid. And that, first and foremost, I think, has got to be a guiding principle when we look at this issue.

Secondly, that we do adopt treatment standards that reflect America's core values when it comes to respect for human rights. And I think that's something that everybody probably is in general agreement on as well.

And so those are sort of two guiding principles.

And finally, as has been noted today as well, my concern would be that we -- in doing that, that when we accomplish these things, we not do it in a way that hamstrings our ability to acquire the intelligence that is necessary for us to prosecute and succeed and win the war on terror.

And that seems to be the real issue here in coming up with the legal framework, is how best to accomplish that and yet enable the people who we're really relying on to get the information that's necessary for us to succeed in the war on terror are able to accomplish that objective.

Secretary England, just -- it seems to me, too -- and I listened to this whole discussion about lawful and unlawful combatants, and there are different sort of standards that are in the Geneva Conventions to the DTA -- but Secretary England, in your opinion, within the Geneva Convention, is the definition of unlawful combatant adequately defined to encompass terrorist groups and how detainees from those groups are to be treated and the rights that they have under the convention?

MR. ENGLAND: Well, we know they are not prisoners of war. So -- in my understanding -- and again, I'm not the lawyer on this, like yourself, Senator -- but my understanding is it does define unlawful combatant. And Common Article 3 is common across all four Geneva Conventions. So when you apply it -- I mean, I believe we do know how to apply Common Article 3 if it is properly defined.

And so, as the attorney general stated earlier, what we have wrestled with, there are particular words, and particularly the outages upon personal dignity and particularly humiliating and degrading treatment, which are very subjective.

And so that is of concern, which is one reason it's very important that we have a legal basis for Common Article 3 as we go forward, and the purpose for this legislation is hopefully to help clarify that. So I believe when we have defining legislation for Common Article 3, then we will have an adequate basis to go forward in terms of applying Common Article 3 to unlawful combatants.

ATTY GEN. GONZALES: Senator, I think part of the problem we have is in 1949, the drafters and those who signed the Geneva Conventions did not envision this kind of conflict. You know, we have a superpower like the United States taking on a terrorist group that's not really tied to a state actor.

And so some of the provisions of the Geneva Convention, I think you have to ask yourself, do they continue to make sense? And I think that's a legitimate question for the administration and for Congress. And I'm not talking about those provisions that relate to basic humane treatment. Obviously those remain relevant today and very, very important, and something that we believe in, is consistent with our values.

But some of the provisions, quite frankly, it's hard to square with the kind of enemy that we deal with today. And I know there have been discussions within the State Department. I've testified about the fact that this is an issue we have wrestled with for years in the administration about; I mean, should there be a formal evaluation of the Geneva Conventions?

I want to emphasize very quickly, having made that statement, I'm not in any way suggesting a retreat from the basic principles of Geneva in terms of the humanitarian treatment. I mean, obviously that remains eternal, and we need to continue it and we need to fight for that. But there are certain provisions that I wonder, given the times that we currently live in, and given this new enemy and this new kind of conflict, whether all the provisions continue to make sense.

SEN. THUNE: And my concern would be, with respect to the way our own men and women are treated, is for state actors and those that follow the conventions and rules of war, that we have standards that are fair and respectful of those basic human rights.

But on the other hand, at the same time, I'm somewhat sympathetic to some of the comments that Senator Sessions was making that you aren't dealing with -- I don't think the terrorist organizations could care less about what kind of -- what we do here. It doesn't mean anything to them. When they -- if they've gotten possession of some of our people, they're going to treat them the same way they treat -- we've seen them treat them on our television screens and everywhere else, and that is to kill and destroy without conscience or remorse. And I think that's a very different standard. And so that's why I'm kind of getting at this whole distinction between lawful and unlawful combatants.

ATTY GEN. GONZALES: I agree with you. I don't think al Qaeda -- I don't think their actions would change one bit depending on how we deal with people that we detain. But, quite frankly, they're not the audience that we should be concerned about.

SEN. THUNE: Right.

ATTY GEN. GONZALES: There are expectations of the United States in terms of how we treat people, and so there are basic standards of humanity that need to be respected, irrespective of how brutal the enemy is.

SEN. WARNER: Would you like another question?

SEN. THUNE: Well, if I might, just one last question.

I'd address this to Secretary England.

Has there been any concern within the department that the legislation that's being considered will actually create an incentive for combatants that the United States will face in the future to ignore the laws of war, because either way, they're going to be treated as if they were legal combatants? I'm saying that terrorist groups that might -- instead of following the conventions and rules of war, if they figure they're going to be treated as legal, lawful enemy combatants, as opposed to unlawful or terrorist organizations, I mean, is that a concern?

ATTY GEN. GONZALES: I don't think that that is a concern. I mean, we are contemplating -- again, as I indicated in response to an earlier question, a provision that makes it clear that if the president or the secretary of Defense determine you are a prisoner of war, so if you're fighting by the rules, you're not going to be covered under these proceedings. And so I would hope that that would provide an incentive, quite frankly, for people to fight according to the laws of war so that they would receive all the protections under the Geneva Convention.

SEN. THUNE: Thank you, Mr. Chairman.

SEN. WARNER: Thank you, Senator.

Gentlemen, we've had a good hearing, and I'm going to wrap up here very shortly.

But I must say, I was quite interested, Senator Thune, in the question and answer, reply, and really the colloquy that you had with our distinguished panel of witnesses. And I couldn't agree more.

I remember the year 1949 very well. (Chuckles.) I spent a -- the last year of World War II in uniform, and had come out and actually had just joined the Marine Corps in 1949.

And nobody envisioned the situation that faces the world today and particularly those nations, which I'm so proud of our nation, fighting this war on terror. And I think you're exactly right; that was never envisioned. But there is lan-

guage in that convention that I'm sure we're going to incorporate and follow because the court has spoken to it, the Supreme Court, and that's the law of the land. And you and I as lawyers respect that.

And that brings me to, as I look back over the work that we've done so far, and I look back at the UCMJ, that has a relatively small amount of statutory language and a considerable amount of codification of rules and so forth and a lot of presidential rule making.

Now, how should we approach this statute? Should Congress, given the importance of the Supreme Court decision and other things, adopt more legislative and less rule making?

ATTY GEN. GONZALES: That's a --

SEN. WARNER: If you want to reflect on that, please do so. I think it's something we should discuss further, the two of us and with other colleagues, as we go along.

ATTY GEN. GONZALES: All right, Mr. Chairman.

SEN. WARNER: So you see my point there?

ATTY GEN. GONZALES: No question about it. I mean -- and obviously, that's probably always a discussion or debate with respect to a piece of legislation and how much flexibility or discretion to give the executive branch. And obviously, when you're talking about discretion to the commander in chief in a time of war, that seems to make some sense. Some people believe that the more that Congress codifies, the more likely it is to bulletproof it from a bad decision in the courts. I think in this particular case, quite frankly, there are things that would be helpful to have codified, but there are certain areas, quite frankly, that I think leaving flexibility to the commander in chief through the secretary of Defense makes sense.

And I think our thinking on it reflects that kind of balance, where, again, it's helpful to have some clarity, but also provide some flexibility to the secretary of Defense.

SEN. WARNER: All right. At the moment, I share those views. We want to establish the four corners, and the Constitution is very clear that the president is the commander in chief. Yet there is other provision, we make the rules with regard to the men and women of the armed forces.

So somewhere in between those two constitutional provisions is our challenge.

But I'm enormously pleased with this hearing. I think we've made great progress, and I commend both of you.

And I wonder if you'd like, for purposes of the record, to have the names of those individuals who accompanied you here today and who presumably have worked hard on this included in this record.

ATTY GEN. GONZALES: Thank you, Mr. Chairman. I'm accompanied -- you well Mr. Steve Bradbury, who's the acting assistant attorney general for the Office of Legal Counsel. And he and his team -- and he's got a strong, able team -- have been really at the forefront of the drafting and negotiation.

SEN. WARNER: Around the clock, seven days a week.

ATTY GEN. GONZALES: I'm also here with Kyle Sampson, my chief of staff, and Will Moschella, who is my legislative director, as well as Tasia Scolinos -- I don't know if she's still here -- who is head of my Public Affairs Office.

SEN. WARNER: (Inaudible.) That's true.

ATTY GEN. GONZALES: Thank you, Mr. Chairman.

SEN. WARNER: Thank you very much.

And Secretary England.

MR. ENGLAND: Who's been working all the hard work every day and literally eery night and every weekend is Mr. Dan Dell'Orto, who has been working with all the folks in the Department of Justice but also all the people in the Department of Defense.

I do want to comment, Mr. Chairman, that we have had the general counsels from all of our services. We've had the JAGs. We've had our service chiefs. We've had our service secretaries. We've had staff within the department, the

General Counsel's Office. And Mr. Dan Dell'Orto has been coordinating all of that, along with -- by the way, all of our combatant commanders have been involved in all this. So we have been fully vetting and coordinating all these discussions, all these iterations as we have gone along. And Mr. Dan Dell'Orto's been doing a wonderful job in the Department of Defense, and I do thank him and his team for that great effort.

SEN. WARNER: Thank you very much. And we thank you, recognizing that you're not a lawyer, but you've done your very best and think you've held your own quite well.

MR. ENGLAND: Thank you.

SEN. WARNER: Not too late to get that degree. (Laughter.)

MR. ENGLAND: It's far too late, Mr. Chair. (Chuckles.)

SEN. WARNER: Well, you've got a little extra time. (Laughter.)

Senator Byrd came to the United States Senate and was a senator and went to night law school for a number of years and got his law degree.

Thank you very much. The hearing is now concluded, and we shall have further hearings of this committee on this important subject. (Strikes gavel.)

Thank you, guys.

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